26

(5)

No. 05-746

FILED
JUL 17 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

TIMOTHY SORRELL,
Respondent.

On Writ of Certiorari to the Missouri Court of Appeals

BRIEF OF PETITIONER

LAURA D. HUNT
SENIOR GENERAL ATTORNEY
LAW DEPARTMENT
NORFOLK SOUTHERN CORPORATION
3 Commercial Place
Norfolk, VA 23510

JAMES W. ERWIN
DAVID DICK
THOMPSON COBURN LLP
One US Bank Plaza
St. Louis, MO 63101

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
ERIC A. SHUMSKY
JULIE A. GURLEY
RUTHANNE M. DEUTSCH
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

July 17, 2006

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the court below erred in determining that the causation standard for railroad *negligence* under the Federal Employers Liability Act ("FELA") differs from the causation standard for employee *contributory negligence*.

PARTIES TO THE PROCEEDINGS

All parties are listed in the caption.

RULE 29.6 STATEMENT

Norfolk Southern Railway Company has a parent company, the Norfolk Southern Corporation, which is publicly traded. No other publicly held company owns more than 10% of petitioner's stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTES OR OTHER PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
A. Statutory Background	1
B. Factual Background	5
C. Proceedings Below	6
SUMMARY OF ARGUMENT	7
ARGUMENT	10
I. UNDER FELA, THE CAUSATION STANDARDS FOR NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE ARE THE SAME	10
A. The Common Law At The Time FELA Was Enacted Employed The Same Proximate-Cause Standard For Negligence And For Contributory Negligence	12
B. Modern Contributory And Comparative Negligence Schemes Apply The Same Causation Standards To Defendant And Plaintiff Negligence	19

TABLE OF CONTENTS—continued

Page

C. Divergent Causation Standards Are Inconsistent With The FELA System Of Comparative Negligence, Which Apportions Damages Based On Relative Fault (Not Relative Causation) 22

II. DIVERGENT CAUSATION STANDARDS CANNOT BE JUSTIFIED ON THE GROUNDS THAT SECTION 1 ABROGATED THE PROXIMATE CAUSE RULE FOR RAILROAD NEGLIGENCE 25

A. This Court Has Long Held, In Keeping With FELA's Plain Language, That Plaintiffs Must Prove That Railroad Negligence Proximately Caused Their Injury 26

B. *Rogers* Did Not *Sub Silentio* Overrule Decades Of Precedent Establishing A Federal Rule Of Proximate Cause Under FELA 34

C. Applying Equivalent Proximate-Cause Standards To Defendant Negligence And Plaintiff Contributory Negligence Is The Best Rule As A Matter Of Policy 42

1. Proximate Cause Is Widely Recognized As A Fundamentally Just Standard 42

2. Divergent Causation Standards Are Inequitable And Hard To Administer 47

CONCLUSION 50

TABLE OF AUTHORITIES

CASES Page

Aktieselskabet Cuzco v. *The Sucarseco*, 294 U.S. 394 (1935) 17
Anza v. *Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006) 42, 44
Associated Gen. Contractors of Cal., Inc. v. *California State Council of Carpenters*, 459 U.S. 519 (1983) 13, 33, 43
Astoria Fed. Sav. & Loan v. *Solimino*, 501 U.S. 104 (1991) 12
Atchison, Topeka & Santa Fe Ry. v. *Buell*, 480 U.S. 557 (1987) 1
Atchison, Topeka & Santa Fe Ry. v. *Henry*, 45 P. 576 (Kan. 1896) 16
Atlantic Coast Line R.R. v. *McIntosh*, 198 So. 92 (Fla. 1940) 39
Bailey v. *Central Vt. Ry.*, 319 U.S. 350 (1943) 32
Bailey v. *Norfolk & W. Ry.*, 942 S.W.2d 404 (Mo. Ct. App. 1997) 47
Baltimore & Ohio R.R. v. *Kreager*, 56 N.E. 203 (Ohio 1899) 31
Barrickman v. *Marion Oil Co.*, 32 S.E. 327 (W. Va. 1898) 31
Beard v. *Railway Express Agency, Inc.*, 323 S.W.2d 732 (Mo. 1959) 26
Blue Shield of Va. v. *McCready*, 457 U.S. 465 (1982) 46
Bolin v. *Chicago, St. Paul., Minneapolis & Omaha. Ry.*, 84 N.W. 446 (Wis. 1900) 31
Brady v. *Southern Ry.*, 320 U.S. 476 (1943) ... 27, 38, 45
Brady v. *Terminal R.R. Ass'n*, 303 U.S. 10 (1938) 28, 41
Brown v. *Western Ry. of Ala.*, 338 U.S. 294 (1949) 28

TABLE OF AUTHORITIES—continued

Page

Bueche v. *Kansas City*, 492 S.W.2d 835 (Mo. 1973) 4
Carter v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430 (1949) 18, 24, 28, 39, 45
Chesapeake & Ohio Ry. v. *Stapleton*, 279 U.S. 587 (1929) 2
Cicero & Proviso Street Ry. v. *Meixner*, 43 N.E. 823 (Ill. 1895) 16
Consolidated Rail Corp. v. *Gottshall*, 512 U.S. 532 (1994) 2, 11, 41, 45
Cooper v. *Georgia, Carolina & N. Ry.*, 39 S.E. 543 (S.C. 1901) 31
Coray v. *Southern Pac. Co.*, 335 U.S. 520 (1949) 28, 35, 36, 39
Cornovski v. *St. Louis Transit Co.*, 106 S.W. 51 (Mo. 1907) 31
Crane v. *Cedar Rapids & Iowa City Ry.*, 395 U.S. 164 (1969) 41
Davis v. *Wolfe*, 263 U.S. 239 (1923)... 27, 28, 38, 41, 45
Denver & Rio Grande R.R. v. *Peterson*, 69 P. 578 (Colo. 1902) 31
Dura Pharms. v. *Broudo*, 544 U.S. 336 (2005) 42, 44
Edelman v. *Jordan*, 415 U.S. 651 (1974) 40
Ellis v. *Union Pac. Ry.*, 329 U.S. 649 (1947) 45
Exxon Co., U.S.A. v. *Sofec, Inc.*, 517 U.S. 830 (1996) 20, 42, 43
Ferguson v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521 (1957) 2, 39, 40
Fish v. *Chicago Rock Island & Pac. Ry.*, 172 S.W. 340 (Mo. 1914) 5
Florida Cent. & Pac. R.R. v. *Williams*, 20 So. 558 (Fla. 1896) 16
The Francis Wright, 105 U.S. 381 (1881) 17
The G.R. Booth, 171 U.S. 450 (1898) 17

TABLE OF AUTHORITIES—continued

Page

Galena & Chi. Union R.R. v. *Jacobs*, 20 Ill. 478, 1858 WL 6123 (1858) 16

Ganotis v. *NewYork Cent. R.R.*, 342 F.2d 767 (6th Cir. 1965) 23

Georgia R.R. & Banking Co. v. *Neely*, 56 Ga. 540, 1876 WL 3277 (1876) 31

Gila Valley Globe & Northern Ry. v. *Lyon*, 80 P. 337 (Ariz. 1905), *aff'd*, 203 U.S. 465 (1906) 31

Grand Trunk R.R. v. *Ives*, 144 U.S. 408 (1891) 13

Grand Trunk W. Ry. v. *Lindsay*, 233 U.S. 42 (1914) 3, 23

Gulf, Colo. & Santa Fe Ry. v. *Shieder*, 30 S.W. 902 (Tex. 1895) 31

Guthrie v. *Maine Cent. R.R.*, 18 A. 295 (Me. 1889) 31

Hines v. *Sweeney*, 201 P. 165 (Wyo. 1921) 38

Holmes v. *Securities Investor Prot. Corp.*, 503 U.S. 258 (1992) 42, 44

Howard v. *Illinois Cent. R.R. (Employers' Liab. Cases)*, 207 U.S. 463 (1908) 16

Humphrey's Executor v. *Myers*, 295 U.S. 602 (1935) 41

Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977) 40

Illinois Cent. R.R. v. *Skaggs*, 240 U.S. 66 (1916) 22, 23, 30

Inman v. *Baltimore & Ohio Ry.*, 361 U.S. 138 (1959) 45

Jacksonville Street Ry. v. *Chappell*, 21 Fla. 175, 1885 WL 1758 (1885) 31

Jahn v. *The Folmina*, 212 U.S. 354 (1909) 17

Johnson v. *Offshore Express, Inc.*, 845 F.2d 1347 (5th Cir. 1988) 44

Kernan v. *American Dredging Co.*, 355 U.S. 426 (1958) 41

TABLE OF AUTHORITIES—continued

Page

Lang v. *New York Cent. R.R.*, 255 U.S. 455 (1921) 28

Lea v. *Southern Pub. Utils. Co.*, 97 S.E. 492 (N.C. 1918) 18

Leake v. *Burlington N. R.R.*, 892 S.W.2d 359 (Mo. Ct. App. 1995) 4, 5

Louisville & Evansville Mail Co. v. *Barnes' Adm'r*, 79 S.W. 261 (Ky. 1904) 31

Louisville & Nashville R.R. v. *Layton*, 243 U.S. 617 (1917) 28

The Manitoba, 122 U.S. 97 (1887) 17

Manson v. *Great N. Ry.*, 155 N.W. 32 (N.D. 1915) 29

Mayor of Knoxville v. *Cox*, 53 S.W. 734 (Tenn. 1899) 31

The Max Morris v. *Curry*, 137 U.S. 1 (1890) 17

Memphis & Charleston R.R. v. *Jobe*, 10 So. 672 (Miss. 1891) 31

Minneapolis, St. Paul & Sault Saint Marie Ry. v. *Rock*, 279 U.S. 410 (1929) 3

Minneapolis, St. Paul & Sault Ste. Marie Ry. v. *Goneau*, 269 U.S. 406 (1926) 29

Mobile & Ohio R.R. v. *Campbell*, 75 So. 554 (Miss. 1917) 30, 36

Mondou v. *New York, New Haven & Hartford R.R.*, 223 U.S. 1 (1912) 2, 3

Monessen Sw. Ry. v. *Morgan*, 486 U.S. 330 (1988) 11, 32

Nelson v. *Northern Pac. Ry.*, 148 P. 388 (Mont. 1915) 29

New York Cent. R.R. v. *Ambrose*, 280 U.S. 486 (1930) 28

New York, Chi. & St. Louis R.R. v. *Niebel*, 214 F. 952 (6th Cir. 1914) 39

TABLE OF AUTHORITIES—continued

Page

New York, Chi. & St. Louis R.R. v. *Periguey*, 37 N.E. 976 (Ind. 1894) 31

Nord v. *Boston & Mont. Consol. Copper & Silver Mining Co.*, 75 P. 681 (Mont. 1904) 31

Norfolk & W. Ry. v. *Earnest*, 229 U.S. 114 (1913) 18, 24, 29

Norfolk & W. Ry. v. *Ayers*, 538 U.S. 135 (2003) 3, 17, 19, 32, 49

Northwest Pac. R.R. v. *Bobo*, 290 U.S. 499 (1934) 28

O'Donnell v. *Elgin, Joliet & E. Ry.*, 338 U.S. 384 (1949) 28, 46

O'Melveny & Myers v. *FDIC*, 512 U.S. 79 (1994) 32

Page v. *St. Louis Sw. Ry.*, 349 F.2d 820 (5th Cir. 1965) 50

Palsgraf v. *Long Island R.R.*, 248 N.Y. 339 (N.Y. 1928) 45

Paquin v. *Wisconsin Cent. Ry.*, 108 N.W. 882 (Minn. 1906) 31

Park v. *O'Brien*, 23 Conn. 339, 1854 WL 818 (1854) 31

Parker v. *Atchison, Topeka & Santa Fe Ry.*, 70 Cal. Rptr. 8 (Cal. Ct. App. 1968) 47

Pendroy v. *Great N. Ry.*, 117 N.W. 531 (N.D. 1908) 31

Peters v. *CSX Transp., Inc.*, No. 04-cv-077, 2006 WL 42179 (W.D. Ky. Jan. 3, 2006) 47

Porter v. *Bangor & Aroostook R.R.*, 75 F.3d 70 (1st Cir. 1996) 44

Ricker v. *Freeman*, 50 N.H. 420, 1870 WL 3123 (1870) 31

Ricketts v. *Kansas City Stockyards Co. of Me.*, 484 S.W.2d 216 (Mo. 1972) 4, 26

TABLE OF AUTHORITIES—continued

Page

Ridge v. *Norfolk S. R.R.*, 83 S.E. 762 (N.C. 1914) 18

Rietveld v. *Wabash R.R.*, 105 N.W. 515 (Iowa 1906) 31

Rogers v. *Missouri Pac. Ry.*, 352 U.S. 500 (1957) ..... *passim*

Rosevear v. *Borough of Osceola Mills*, 32 A. 548 (Pa. 1895) 31

Southern Ry. v. *Howell*, 34 So. 6 (Ala. 1903) 31

Sawyer v. *Sauer*, 10 Kan. 466, 1872 WL 722 (1872) 16

Schneider v. *Market Street Ry.*, 66 P. 734 (Cal. 1901) 31

Seaboard Air Line Ry. v. *Tilghman*, 237 U.S. 499 (1915) 3, 14, 24

Seaboard Shipping Corp. v. *Inland Waterways Corp. (In re Seaboard Shipping Corp.)*, 449 F.2d 132 (2d Cir. 1971) 20

Snyder v. *Chicago, Rock Island & Pac. R.R.*, 521 S.W.2d 161 (Mo. Ct. App. 1973) 4, 5

Southern Pac. Co. v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918) 12, 43

Southern Ry. v. *Foote Mineral Co.*, 384 F.2d 224 (6th Cir. 1967) 20

Southern Ry. v. *Watson*, 30 S.E. 818 (Ga. 1898) 17

Spokane & Inland Empire R.R. v. *Campbell*, 241 U.S. 497 (1916) 18, 29

St. Louis, Iron Mountain & S. Ry. v. *McWhirter*, 229 U.S. 265 (1913) 28

St. Louis, Iron Mountain & S. Ry. v. *Coolidge*, 83 S.W. 333 (Ark. 1904) 31

St. Louis & S.F. R.R. v. *Conarty*, 238 U.S. 243 (1915) 28

St. Louis-S.F. Ry. v. *Mills*, 271 U.S. 344 (1926) 28

TABLE OF AUTHORITIES—continued

Page

St. Louis Sw. Ry. v. *Dickerson*, 470 U.S. 409 (1985) 25
Standard Oil Co. of N.J. v. *United States*, 340 U.S. 54 (1950) 46
Stratton v. *Central City Horse Ry.*, 95 Ill. 25, 1880 WL 10004 (1880) 16
Stringfellow v. *Atlantic Coast Line R.R.*, 290 U.S. 322 (1933) 16, 36
Stucke v. *Milwaukee & Miss. R.R.*, 9 Wis. 202, 1859 WL 2832 (1859) 16
Swinson v. *Chicago, St. Paul, Minneapolis & Omaha Ry.*, 294 U.S. 529 (1935) 28
Tennant v. *Peoria & Pekin Union Ry.*, 321 U.S. 29 (1944) 27
Tiller v. *Atlantic Coast Line R.R.*, 318 U.S. 54 (1943) ..... *passim*
Trickey v. *Clark*, 93 P. 457 (Or. 1908) 31
Union Oil Co. of Cal. v. *The San Jacinto*, 409 U.S. 140 (1972) 21
Union Pac. R.R. v. *Hadley*, 246 U.S. 330 (1918) 29
United States v. *Ron Pair Enter., Inc.*, 489 U.S. 235 (1989) 10
United States v. *Texas*, 507 U.S. 529 (1993) 12
United States v. *Wells*, 519 U.S. 482 (1997) 10
Urie v. *Thompson*, 337 U.S. 163 (1949) 2, 11, 28
Wilmoth v. *Chicago, Rock Island & Pac. R.R.*, 486 S.W.2d 631 (Mo. 1972) 4

STATUTES

Act of June 11, 1906, ch. 3073, 34 Stat. 232 16
FELA Amendments Act, ch. 685, 53 Stat. 1404 (1939) 22
15 U.S.C. § 15 43
45 U.S.C. § 51 ..... *passim*

TABLE OF AUTHORITIES—continued

	Page
45 U.S.C. §§ 51-60	1
§ 53	*passim*
Fla. Stat. § 2345 (1892)	15
1910 Miss. Laws 125	15
1907 N.D. Laws 333	16
1908 Ohio Laws 25	16
1907 S.D. Sess. Laws 455	17
RULE	
Mo. R. Civ. P. 70.02(b)	4
LEGISLATIVE HISTORY	
Hearing Before the H. Comm. on the Judiciary, 76th Cong. (Apr. 17, 1939)	33
S. Rep. No. 76-661 (1939)	23
H.R. Rep. No. 59-2335 (1906)	22
H.R. Rep. No. 60-1386 (1908)	*passim*
40 Cong. Rec. 4601 (1906)	32
42 Cong. Rec. 4226 (1908)	3, 22, 24
84 Cong. Rec. 10,709 (1939)	33
SCHOLARLY AUTHORITY	
Charles Fisk Beach, Jr., *A Treatise on the Law of Contributory Negligence or Negligence as a Defense* (3d ed. 1899)	13, 15, 18, 30, 32
Melville Madison Bigelow, *The Law of Torts* (7th ed. 1901)	21
Richard V. Campbell, *Wisconsin's Comparative Negligence Law*, 7 Wis. L. Rev. 222 (1932)	17
Thomas M. Cooley, *A Treatise on the Law of Torts* (2d ed. 1888)	33
Thomas M. Cooley, *A Treatise on the Law of Torts* (John Lewis students' ed. 1907)	14

TABLE OF AUTHORITIES—continued

Page

1 Dan B. Dobbs, *The Law of Torts* (2001) 19, 21, 46

Leon Green, *Contributory Negligence and Proximate Cause*, 6 N.C. L. Rev. 3 (1927) 34

William B. Hale, *Handbook on the Law of Torts* (1896) 12

3 Fowler V. Harper, Fleming James & Oscar S. Gray, *The Law of Torts* (2d ed. 1986) 20

Fleming James, Jr., *Contributory Negligence*, 62 Yale L.J. 691 (1953) 34

W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* (5th ed. 1984) 46

1 Edgar B. Kinkead, *Commentaries on the Law of Torts* (1903) 14

Daunis McBride, *Richey's Federal Employers' Liability, Safety Appliance, and Hours of Service Acts* (2d ed. 1916) 18, 27, 30, 35

Francis S. Philbrick, *Loss Apportionment of Negligence Cases Part II*, 99 U. Pa. L. Rev. 766 (1951) 21

John G. Phillips, *The Sole Proximate Cause "Defense": A Misfit in the World of Contribution and Comparative Negligence*, 22 S. Ill. U. L.J. 1 (1997) 34

William L. Prosser, *Comparative Negligence*, 51 Mich. L. Rev. 465 (1953) 14, 15, 16, 34

1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* (4th ed. 2004) 20

1 Thomas G. Shearman & Amasa A. Redfield, *A Treatise on the Law of Negligence* (5th ed. 1898) 12, 13, 15

1 Thomas G. Shearman & Amasa A. Redfield, *A Treatise on the Law of Negligence* (Robert G. Street ed., 6th ed. 1913) 14

Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 Harv. L. Rev. 103 (1911) 33

TABLE OF AUTHORITIES—continued

Page

1 J.G. Sutherland, *A Treatise on the Law of Damages* (1883) 33

1 Seymour D. Thompson, *Commentaries on the Law of Negligence In All Relations* (2d ed. 1901) 18, 30

E.A. Turk, *Comparative Negligence on the March—Part II*, 28 Chi.-Kent L. Rev. 304 (1950) 14, 15, 17

7 Edward F. White, *A Supplement to the Commentaries on the Law of Negligence of Seymour D. Thompson, LL. D.* (1907) 38

OTHER AUTHORITIES

Missouri Approved Jury Instructions (6th ed. 2002) 26, 49

Restatement of Torts (1934) 13

Restatement (Second) of Torts (1965) 19, 35, 42, 44

Restatement (Third) of Torts: Apportionment of Liability (2000) 19, 20, 42, 48

Uniform Comparative Fault Act (1977) (amended 1979) 20

OPINIONS BELOW

The order of the Missouri Court of Appeals affirming the judgment of the trial court is published at 170 S.W.3d 35 (Mo. Ct. App. 2005) (per curiam), and is reproduced in the Petition Appendix ("Pet. App.") at 1a-2a. That order was accompanied by an unpublished opinion, which is reproduced at Pet. App. 3a-21a. The Missouri Court of Appeals' order denying rehearing and/or transfer to the Missouri Supreme Court is reproduced at Pet. App. 32a. The order of the Missouri Supreme Court denying an application for transfer from the Missouri Court of Appeals is reproduced at Pet. App. 31a.

JURISDICTION

The judgment of the Missouri Court of Appeals was entered on July 5, 2005. Pet. App. 1a. The Missouri Court of Appeals denied rehearing and transfer to the Missouri Supreme Court on August 22, 2005. Pet. App. 32a. The Missouri Supreme Court denied transfer on September 20, 2005. Pet. App. 31a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTES OR OTHER PROVISIONS INVOLVED

Relevant portions of the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, are reproduced at Pet. App. 33a-34a. Missouri Approved Instructions ("MAI") 8.02, 24.01, 32.07(B), 36.01 and 37.07 are reproduced at Pet. App. 35a-38a.

STATEMENT OF THE CASE

A. Statutory Background

1. Congress enacted FELA "to provide a federal remedy for railroad workers who suffer personal injuries as a result of the negligence of their employer or their fellow employees." *Atchison, Topeka & Santa Fe Ry.* v. *Buell*, 480 U.S. 557, 561 (1987). FELA is not, and was not meant to be, a no-fault

worker's compensation system. *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 543 (1994). Unlike worker's compensation laws, FELA requires a plaintiff to prove common-law negligence (rather than imposing no-fault liability on the employer), and permits plaintiffs to recover tort damages (rather than scheduled benefits). Section 1 of FELA makes "[e]very common carrier by railroad ... liable in damages" for the injury or death of an employee employed in interstate commerce that "result[s] in whole or in part from the [railroad's] negligence." 45 U.S.C. § 51. As a result of this tort liability system, FELA is the exclusive remedial scheme for such injuries. There is no worker's compensation program for railroad employees, see *Gottshall*, 512 U.S. at 543; *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521, 538-39 (1957) (Frankfurter, J., dissenting), and state remedies are preempted, *Mondou* v. *New York, New Haven & Hartford R.R.*, 223 U.S. 1, 55 (1912).

Under FELA, "[t]he rights and obligations of the petitioner depend upon that Act and applicable principles of common law as interpreted by the federal courts." *Chesapeake & Ohio Ry.* v. *Stapleton*, 279 U.S. 587, 590 (1929). The federal common law of FELA is derived from prevailing common-law principles, except where Congress explicitly departed from those rules. See *Urie* v. *Thompson*, 337 U.S. 163, 182 (1949) ("the Federal Employers' Liability Act is founded on common-law concepts of negligence and injury, subject to such qualifications as Congress has imported into those terms"); *Gottshall*, 512 U.S. at 541-42. In enacting FELA in 1908, Congress expressly supplanted five common-law tort doctrines: it (1) abolished "the fellow-servant rule," which prevented workers from recovering any damages for injuries caused by a coworker's negligence; (2) rejected contributory negligence as an absolute defense to liability, instead making it a rule for apportionment of damages (except where liability is based on a violation of a safety statute); (3) abolished the defense of assumption of the risk when liability was based on

a violation of a safety statute; (4) abolished the rule against recovery for wrongful death; and (5) abolished the power of railroads to limit their liability by contract. See *Mondou*, 223 U.S. at 49-50; *Minneapolis, St. Paul & Sault Saint Marie Ry.* v. *Rock*, 279 U.S. 410, 413 (1929); *Norfolk & W. Ry.* v. *Ayers*, 538 U.S. 135, 145 (2003); 42 Cong. Rec. 4226, 4227 (1908) (statement of Rep. Henry). In 1939, Congress abolished the defense of assumption of the risk in all FELA cases. *Tiller* v. *Atlantic Coast Line R.R.*, 318 U.S. 54, 66-67 (1943).

At issue here is the second of these abrogated common law principles: Congress's directive in section 3 of the Act that contributory negligence shall not bar a recovery, but that the damages shall be diminished by the jury "in proportion to the amount of negligence attributable to such employee." 45 U.S.C. § 53. At common law, a plaintiff's contributory negligence was "a complete bar or defense" to recovery. *Seaboard Air Line Ry.* v. *Tilghman*, 237 U.S. 499, 500 (1915). As the language of section 3 makes plain, Congress replaced this "strict rule of contributory negligence," *Tiller*, 318 U.S. at 62, with a regime of comparative negligence, by which a plaintiff's contributory negligence merely diminishes recovery, and does not foreclose it. *Grand Trunk W. Ry.* v. *Lindsay*, 233 U.S. 42, 49 (1914). This modification of the common-law rule was motivated by concerns of simple justice: It made "each party responsible for his own negligence, and require[d] each to bear the burden thereof." H.R. Rep. No. 60-1386, at 1 (1908); see also *id.* at 5 ("What can be more fair than that each party shall suffer the consequences of his own carelessness?").

Yet, while Congress did modify this aspect of the contributory-negligence rule, it did not change the common-law causation standards that apply to negligence claims. At common law, the defendant's negligence and the plaintiff's contributory negligence were measured by the same causal yardstick—to justify (or prevent) recovery, the negligence (or contributory negligence) must be a proximate cause of the

plaintiff's injury. Nothing in the text or legislative history of FELA evinces any intention to modify these well-recognized standards.

2. In conflict with the common-law rule, the Missouri Supreme Court has promulgated jury instructions that employ different causation standards for negligence and contributory negligence under FELA. These jury instructions are binding on the lower Missouri courts. *Bueche* v. *Kansas City*, 492 S.W.2d 835, 840 (Mo. 1973); Mo. R. Civ. P. 70.02(b). The Missouri Approved Instruction for FELA negligence requires the plaintiff to prove that the railroad's "negligence resulted in whole or in part in [injury to plaintiff]." MAI 24.01 (footnote omitted) (brackets in original) (Pet. App. 35a-36a).[1] Although the instruction tracks the statutory language, see 45 U.S.C. § 51, the Missouri courts have interpreted the language of the statute and the instruction to abrogate the rule of proximate cause that prevailed at common law. *Ricketts* v. *Kansas City Stockyards Co. of Me.*, 484 S.W.2d 216, 221-22 (1972) (en banc); *Wilmoth* v. *Chicago, Rock Island & Pac. R.R.*, 486 S.W.2d 631, 634 (Mo. 1972); *Leake* v. *Burlington N. R.R.*, 892 S.W.2d 359, 365 (Mo. Ct. App. 1995); *Snyder* v. *Chicago, Rock Island & Pac. R.R.*, 521 S.W.2d 161, 165 (Mo. Ct. App. 1973).

---

[1] MAI 24.01 requires that the jury be instructed as follows:

> Your verdict must be for plaintiff if you believe:
>
> First, plaintiff was an employee of defendant and a part of his employment in some way closely and substantially affected interstate commerce, and
>
> Second, [with respect to such conditions for work,] defendant either failed to provide: reasonably safe conditions for work, or reasonably safe appliances, or reasonably safe methods of work, or reasonably adequate help, and
>
> Third, defendant in any one or more of the respects submitted in Paragraph Second was negligent, and
>
> Fourth, such negligence resulted in whole or in part in [injury to plaintiff] [the death of (*decedent's name*)].

By contrast, the Missouri Approved Instructions impose upon FELA defendants the traditional, but heavier, burden of proving that the plaintiff's contributory negligence was a *proximate* cause of his damages. The plaintiff's own negligence must have "*directly* contributed to cause his injury." MAI 32.07(B) (emphasis added) (Pet. App. 36a),[2] which the Missouri courts interpret as requiring a showing of proximate cause. See *Leake*, 892 S.W.2d at 365; *Snyder*, 521 S.W.2d at 165; *Fish* v. *Chicago Rock Island & Pac. Ry.*, 172 S.W. 340, 346 (Mo. 1914).

B. Factual Background

Respondent Sorrell was employed as a trackman by Norfolk Southern. Trial Transcript ("Tr.") 393. As such, he was a "general laborer," and performed various jobs related to track maintenance. *Id.* at 393-94. On November 1, 1999, he drove a dump truck loaded with asphalt that would be used to repair rail crossings near Kendallville, Indiana. *Id.* at 405, 409-10. He unloaded some of the asphalt at the first assigned crossing, *id.* at 410, and was on a gravel road headed for the next crossing when, according to Sorrell, another vehicle approached him, *id.* at 412. The approaching vehicle was another Norfolk Southern truck, driven by Norfolk Southern employee Keith Woodin. *Id.* at 418. Sorrell testified that he slowed down, and pulled far to the right because he did not believe the two trucks could pass one another. *Id.* at 413-14. Just as the trucks attempted to pass each other, he testified, his front tire dropped into a four-foot ditch, and the truck tipped over onto its side. *Id.* at 414-15. Sorrell claims that, as

---

[2] MAI 32.07(B) requires that the jury be instructed as follows:

> You must find plaintiff contributorily negligent if you believe:
>
> First, plaintiff (characterize the act of negligence, such as "failed to keep a lookout for oncoming trains"), and
>
> Second, plaintiff was thereby negligent, and
>
> Third, such negligence of plaintiff directly contributed to cause his injury.

a result of the accident, he suffered various "problems with his neck and back, right wrist and right shoulder." *Id.* at 192.

Woodin provided a different account of the accident. He testified that when he saw Sorrell approaching, he pulled his truck off the road, and was "basically stopped." Tr. at 239. Furthermore, he testified, Sorrell pulled his truck off the road when the two trucks were still 400-500 feet apart, and that was when Sorrell's wheel fell into the roadside ditch. *Id.* at 240. When he saw that happen, Woodin drove to Sorrell, in order to assist him. *Id.* at 241. At about the time that Woodin's truck reached the site where Sorrell's truck had fallen into the ditch, Woodin testified, Sorrell's truck rolled over. *Id.* at 242.

C. Proceedings Below

Sorrell brought suit under FELA, alleging that Norfolk Southern failed to provide him "a reasonably safe place to work," "reasonably safe methods for work," "reasonably safe conditions for work," and "reasonably safe equipment, tools and appliances for work." First Am. Pet. 2 (L.F. 9).[3] He sought damages stemming from various claimed physical injuries, as well as medical expenses, lost wages, and pain and suffering. *Id.*[4] The case was tried to a jury and Norfolk Southern argued, among other things, that Sorrell was contributorily negligent in the manner in which he drove his own truck. See, *e.g.*, Tr. 666-67; see generally *id.* at 659-66.

Norfolk Southern asked the court to instruct the jury that the causation standard for Sorrell's own contributory negligence is identical to the causation standard for Norfolk Southern's negligence. Tr. 574-75 (Pet. App. 27a-28a). It

---

[3] "LF" citations are to the "Legal File" submitted to the Missouri Court of Appeals, which contains excerpts of the trial record.

[4] Sorrell also brought a second cause of action related to an injury that he purportedly suffered while using a tamping tool. First Am. Pet. 3 (L.F. 10). The jury awarded no damages on that claim, and it is not before this Court. *See* Verdict (Pet. App. 25a); Judgment (Pet. App. 22a-23a).

argued that FELA employs a pure comparative fault system, which requires that the same standards of causation apply to the plaintiff's and the defendant's negligence. *Id.* at 575 (Pet. App. 28a-29a). The judge rejected this request because the Missouri Supreme Court's Approved Instructions impose different standards of causation for different parties' negligence—proximate causation for contributory negligence, but less direct cause for negligence. *Id.* at 576 (Pet. App. 29a). The jury returned a verdict against Norfolk Southern in the amount of $1.5 million. In accordance with the jury instructions, the verdict form did not reflect whether the jury had determined that Sorrell was contributorily negligent nor, if so, the extent to which the jury may have reduced plaintiff's damages. See Verdict B (Pet. App. 26a). Norfolk Southern's motion for a new trial was denied. L.F. 189.

On appeal, the Missouri Court of Appeals affirmed solely on the ground that the binding MAI require divergent causation instructions. Pet. App. 7a. Norfolk Southern moved the Missouri Court of Appeals to rehear the case or to transfer it to the Missouri Supreme Court. Both motions were denied. *Id.* at 31a-32a. Norfolk Southern then filed an Application for Transfer with the Missouri Supreme Court, which was denied. *Id.* at 31a.

SUMMARY OF ARGUMENT

Missouri's rule that a jury should be instructed to apply different causation standards to railroad negligence and to employee contributory negligence is an untenable interpretation of FELA. Nothing in the statutory language suggests that result, and in FELA Congress is presumed to have adopted the common law rule absent an explicit departure therefrom. The well-established common-law rule in 1908 (and in admiralty and emerging comparative negligence schemes of the time) was that defendant negligence and plaintiff contributory negligence were measured by the same standard: proximate cause. In enacting FELA in 1908, Congress explicitly abro-

gated common law rules forbidding imputation of the negligence of a fellow servant to the employer, making the employee's contributory negligence an absolute defense to liability, denying recovery for wrongful death, and allowing contractual limitations on liability, and in 1939 it abrogated the defense of assumption of the risk, but Congress has never altered the common law rule of equivalent causation standards. Nor has the common law evolved away from the rule of equivalence; the same causation standards of proximate cause continue today to apply to defendant negligence and contributory negligence in both traditional and comparative negligence jurisdictions and in admiralty.

Not only is there no warrant in the text or in the historical or evolving common law to adopt a different rule for FELA, but the Missouri rule of divergent causation standards is also inconsistent with the operation of the FELA comparative negligence provisions. Congress directed that contributory negligence shall not bar a recovery, but that the damages shall be diminished by the jury "in proportion to the amount of negligence attributable to such employee." 45 U.S.C. § 53. This Court has interpreted that provision to require a jury to determine the total "causal negligence," and divide damages according to the relative share of the total negligence attributable to the railroad and to the employee respectively. Under FELA, damages are apportioned according to relative fault, not relative causal contribution. By imposing a higher causation standard in order for a jury to find contributory negligence, the Missouri rule impermissibly makes the division of damages turn on relative causation rather than relative fault, thus thwarting the statutory purpose to make "each party responsible for his own negligence, and require[] each to bear the burden thereof." H.R. Rep. No. 60-1386, at 1. No comparative negligence scheme adopts the rule that Missouri has imported into FELA.

Missouri's rule of divergent causation standards is predicated on the claim that, in *Rogers* v. *Missouri Pacific Rail-*

way, 352 U.S. 500 (1957), this Court held that FELA abrogated the common law rule of proximate cause, and makes any defendant liable so long as its negligence is the "slightest" cause of injury. That is a flat misreading of *Rogers*. This Court repeatedly has held, from its earliest interpretations of the Act, that the federal standard for railroad negligence under FELA embodies proximate cause. Section 1's requirement that a railroad is liable in damages if the injury "result[ed] in whole or in part" from its negligence, 45 U.S.C. § 51, is an elaboration of the common law rule of proximate cause, not an abrogation of it. At the time of FELA's enactment, numerous common-law courts used that very formulation to clarify that proximate causation could be found even if there were multiple causes of injury. It would have been more than slightly odd if Congress had explicitly abrogated various common law defenses favorable to the employer in the statute, but then only implicitly abrogated a doctrine as central to negligence actions as proximate cause. Indeed, this Court, after cataloging the various abrogations of the common law in the 1908 Act and the 1939 Amendments, made a point of observing that a jury must still decide "whether the carrier was negligent and whether that negligence was the *proximate cause* of the injury." *Tiller*, 318 U.S. at 62-67 (emphasis added).

Rogers is not to the contrary. *Rogers* simply rejected a particular state common-law conception of "proximate cause" that limited railroad liability to circumstances where its negligence was the "sole, efficient, producing cause of injury," 352 U.S. at 506. *Rogers* held that, if there was evidence from which the jury could find that both the railroad's negligence and the employee's negligence were proximate causes of injury, the question of railroad liability must go to the jury even if it played the slightest part in the injury—*i.e.*, if its causal contribution was slight relative to the employee's negligence. Common law courts frequently employed similar analysis to issues of multiple proximate causes. *Rogers* did not silently

overrule at least 20 of this Court's precedents establishing a federal rule of proximate cause under FELA, some of them very recent vintage; on the contrary, it relied on this Court's contributory proximate cause decisions in deriving its test to determine when a case must be submitted to a jury. Furthermore, the petitioner in *Rogers* did not ask the Court to overrule those cases, but instead affirmatively asked it to apply the rule of proximate cause. Nor did any dissenting Justice read the opinion as establishing a new and radical rule that a defendant's liability turns on whether its negligent acts are the "slightest cause" of injury. Such a diluted causation approach is irreconcilable with sound policy; this Court in recent decisions in other contexts has emphasized the justness of the proximate cause rule, which ensures that parties are not held responsible for injuries that are only tenuously and distantly related to their negligence. *Rogers* did not adopt an unjust rule of causation for railroad negligence, much less create an anomalous comparative negligence scheme where a jury is instructed to apply different causation standards to different parties' negligence.

The jury instructions in this case did not properly instruct the jury with regard to contributory negligence, because they allowed recovery to the plaintiff under a causation standard for Norfolk Southern's negligence that was more generous than the standard applied to respondent's contributory negligence. Accordingly, the judgment below should be reversed and the case remanded for a new trial.

ARGUMENT

I. UNDER FELA, THE CAUSATION STANDARDS FOR NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE ARE THE SAME.

In interpreting a federal statute, "[w]e begin with the text." *United States* v. *Wells*, 519 U.S. 482, 490 (1997); *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241-42 (1989). Section 1 of FELA makes "[e]very common carrier by rail-

road ... liable in damages" for the injury or death of an employee employed in interstate commerce that "result[s] in whole or in part from the [railroad's] negligence." 45 U.S.C. § 51. If the plaintiff meets that burden of proof, section 3 provides a limited defense of contributory negligence: "[T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." *Id.* § 53.

Section 3 is silent as to the standard of causation that applies to contributory negligence defenses. In interpreting FELA, this Court looks to common-law principles except where Congress explicitly departed from those rules. *Urie*, 337 U.S. at 182 ("the Federal Employers' Liability Act is founded on common-law concepts of negligence and injury, subject to such qualifications as Congress has imported into those terms"); *Gottshall*, 512 U.S. at 541-42 ("because 'FELA jurisprudence gleans guidance from common-law developments,' we must consider the common law's treatment of the right of recovery asserted by respondents"). And, because FELA *did* expressly abrogate the common law in certain limited respects, it is presumed *not* to have done so with regard to the common-law rules that it did not explicitly modify. *Id.* at 544 ("Only to the extent of these explicit statutory alterations is FELA 'an avowed departure from the rules of the common law'"); *Monessen Sw. Ry.* v. *Morgan*, 486 U.S. 330, 337-38 (1988) ("Congress did not deal at all with the equally well-established doctrine barring the recovery of prejudgment interest, and we are unpersuaded that Congress intended to abrogate that doctrine *sub silentio*"). So, although prevailing common-law principles are not dispositive, "unless they are expressly rejected in the text of the statute, they are entitled to great weight in [this Court's] analysis." *Gottshall*, 512 U.S. at 544. This comports with the general presumption that Congress is presumed not to abrogate common-law principles unless a statute "'speak[s] directly' to the question ad-

dressed by the common law." *United States* v. *Texas*, 507 U.S. 529, 534 (1993).[5]

A. The Common Law At The Time FELA Was Enacted Employed The Same Proximate-Cause Standard For Negligence And For Contributory Negligence.

The common-law causation rule in effect at the time of FELA's enactment (which is the same rule that governs today) was that the standards for defendant negligence and plaintiff contributory negligence were one and the same—to be actionable, the negligent act must be a proximate cause of the damages. This was the rule that governed a plaintiff's efforts to make out a claim for negligence. It likewise was the rule in each of the different contributory-negligence systems that existed at common law during that period.

At the time of FELA's enactment in 1908, it was the well-recognized and unbroken common-law rule that in order to recover damages, a plaintiff must prove that the defendant's negligence proximately caused his injury. William B. Hale, *Handbook on the Law of Torts* § 227, at 449 (1896). Writing for this Court shortly after FELA's enactment, Justice Holmes recognized this foundational principle. See *Southern Pac. Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533-34 (1918) ("The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss."); see also, *e.g.*, 1 Thomas G. Shearman & Amasa A. Redfield, *A Treatise on the Law of Negligence* § 26, at 27 (5th ed. 1898)

---

[5] *See also Texas*, 507 U.S. at 534 ("'[s]tatutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident'") (alteration and omission in original); *Astoria Fed. Sav. & Loan* v. *Solimino*, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles.").

("The breach of duty, upon which an action is brought, must be not only the cause, but the *proximate cause*, of the damage to the plaintiff.") (emphasis in original); Charles Fisk Beach, Jr., *A Treatise on the Law of Contributory Negligence or Negligence as a Defense* § 305, at 446 (3d ed. 1899) (proximate cause is "too firmly founded on reason and justice to be lost sight of in any discussion of liability for negligence"); *Associated Gen. Contractors of Calif., Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 531-33 (1983) (discussing the common law's settled reliance on a proximate cause standard at the end of the nineteenth century).

The same causation standard likewise applied to contributory negligence. The treatise relied upon by the House Committee that sponsored FELA in 1908 declared it a "settled rule of law" that a plaintiff's *contributory* negligence "must contribute as a proximate cause, and not as a remote cause or mere condition." Beach, *supra*, § 24, at 32; *id.* § 33 at 42[6]; see *Grand Trunk R.R.* v. *Ives*, 144 U.S. 408, 429 (1892) ("[A]n action for [negligence] cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured."). The First Restatement of Torts likewise stated that

> [t]he rules which determine the causal relation between the actor's negligent conduct and the harm resulting to him therefrom, which is necessary to make his conduct contributory negligence preventing him from recovery, *are the same* as those ... determining the causal relation between the actor's negligent conduct and the harm to another which is necessary to make him liable therefor.

Restatement of Torts § 462, at 1223 (1934) (emphasis added); *accord id.* § 465 cmt. a; 1 Shearman & Redfield, *supra*, § 94,

---

[6] The House Report for the 1908 statute relied upon Shearman and Redfield's and Beach's treatises for an understanding of common-law rules—and in particular, comparative-negligence regimes—in the course of discussing FELA section 3. H.R. Rep. No. 60-1386, at 5.

at 143-44 ("[t]he plaintiff's fault does not affect his right of action, unless it *proximately* contributed to his injury. It must be a proximate cause, *in the same sense* in which the defendant's negligence must have been a proximate cause in order to give any right of action" (footnote omitted) (second emphasis added)).[7]

Importantly, proximate cause was the rule in each of the contributory and comparative negligence regimes that existed at the time FELA was enacted. During the late nineteenth and early twentieth centuries, the common law began to shift away from the traditional rule of contributory negligence, which barred a contributorily negligent plaintiff from all recovery, to various comparative negligence regimes, which merely limited (or "mitigated") the plaintiff's damages. *Tiller*, 318 U.S. at 62; *Seaboard Air Line Ry.*, 237 U.S. at 500; see generally William L. Prosser, *Comparative Negligence*, 51 Mich. L. Rev. 465, 477-82 (1953); E.A. Turk, *Comparative Negligence on the March—Part II*, 28 Chi.-Kent L. Rev. 304, 304-33 (1950). Congress was fully aware of these emerging comparative-negligence systems when it enacted FELA. See H.R. Rep. No. 60-1386, at 5. And, just as proximate cause was the rule under the old contributory negligence system, it likewise was the recognized standard under the

---

[7] *Accord* Thomas M. Cooley, *A Treatise on the Law of Torts* §347, at 704-05 (John Lewis students' ed. 1907) ("The negligence that will defeat a recovery must be such as proximately contributed to the injury. The remote cause will no more be noticed as a ground of defense than as a ground of recovery." (footnote omitted)); 1 Shearman & Redfield, *supra*, § 61, at 153 (Robert G. Street ed., 6th ed. 1913) ("To constitute contributory negligence, exempting the defendant from liability, it is as necessary that the plaintiff's negligence should be a proximate and not a remote cause, efficiently contributing to the injury or damage, as it is that defendant's primary negligence ... should be a proximate and efficient cause."); 1 Edgar B. Kinkead, *Commentaries on the Law of Torts* § 250, at 533 (1903) ("The doctrine[s] of contributory negligence and proximate cause are so closely allied as to be dependent on each other. The true question in all cases is whether there was negligence on the part of the plaintiff contributing directly as a proximate cause of the injury.").

evolving systems of comparative negligence. Prosser, *supra*, at 481; Turk, *supra*, at 316-17, 333; Beach, *supra*, §§ 72-99, at 112-40; 1 Shearman & Redfield, *supra*, §§ 102-103, at 157-59.

Around the time of FELA's enactment, there existed three primary categories of comparative-negligence systems. First, certain States adopted a regime of pure comparative negligence.[8] This was the same rule that Congress implemented in FELA—the plaintiff's contributory negligence proportionately offset the defendant's negligence—and indeed the language of at least one State statute precisely mirrored FELA.[9] Like FELA, these statutes were silent as to the applicable causation standard, so courts interpreted them as incorporating the traditional rule of proximate cause, both as to negligence and contributory negligence:

> There is an underlying principle applicable to all cases of negligence, ... that holds good in cases falling within the provisions of this statute as in others. That is that the negligence proved against the defendant must, in order to justify recovery, be the direct or proximate cause of the injury, directly or proximately contributing to its result. The courts, in giving this statute in charge, should instruct the juries that, in making the apportionment between the plaintiff's and defendant's negligence, they should not take into consideration any negligence *of ei-*

---

[8] *E.g.*, Fla. Stat. § 2345 (1892) ("No person shall recover damages from a railroad company for injury to himself or his property, when the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury trying the case in proportion to the amount of default attributable to him.").

[9] *Compare* 1910 Miss. Laws 125 ("contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured"), *with* 45 U.S.C. § 53 ("contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee").

> *ther of the parties* that did not directly or proximately contribute to the bringing about of the injury complained of.

Florida Cent. & Pac. R.R. v. *Williams*, 20 So. 558, 563 (Fla. 1896) (emphasis added); *accord Stringfellow* v. *Atlantic Coast Line R.R.*, 290 U.S. 322, 325-26 (1933) (applying proximate cause under a Florida statute).

Second, a group of States adopted the "slight-gross" rule, by which a negligent plaintiff could recover if his "negligence is comparatively slight, and that of the defendant gross." *Galena & Chi. Union R.R.* v. *Jacobs*, 20 Ill. 478, 1858 WL 6123, at *17 (1858); *id.* ("wherever it shall appear that the plaintiff's negligence is comparatively slight, and that of the defendant gross, he shall not be deprived of his action").[10] Under this system, too, proximate causation was the measure of the both parties' negligence. See, *e.g.*, *Sawyer* v. *Sauer*, 10 Kan. 466, 1872 WL 722, at *4 (1872) ("In this state we recognize the different degrees of negligence.... The law does not regard the remote causes of an injury. It is enough to determine the proximate causes."); *Stratton* v. *Central City Horse Ry.*, 95 Ill. 25, 1880 WL 10004 (1880).

Third, some States implemented the "less than" approach, under which a plaintiff could recover only if his fault was less than the defendant's (or, in certain States, less than or equal to the defendant's fault, see Prosser, *supra*, at 489-91). *E.g.*,

---

[10] *E.g.*, 1908 Ohio Laws 25; 1907 N.D. Laws 333; *Stucke* v. *Milwaukee & Miss. R.R.*, 9 Wis. 202, 1859 WL 2832 (1859); *compare Sawyer* v. *Sauer*, 10 Kan. 466, 1872 WL 722 (1872) (adopting a slight-gross regime), *with Atchison, Topeka & Santa Fe. Ry.* v. *Henry*, 45 P. 576 (Kan. 1896) (repudiating it); *cf. also Cicero & Proviso Street Ry.* v. *Meixner*, 43 N.E. 823 (Ill. 1895) (repudiating the Illinois slight-gross system). This was the system that Congress originally chose in the 1906 precursor of FELA that this Court struck down as exceeding Congress's powers under the Commerce Clause. Act of June 11, 1906, ch. 3073, § 2, 34 Stat. 232, 232; *Howard* v. *Illinois Cent. R.R. (Employers' Liab. Cases)*, 207 U.S. 463 (1908).

1907 S.D. Sess. Laws 455; *Southern Ry.* v. *Watson*, 30 S.E. 818 (Ga. 1898). In those States, too, proximate cause was a bedrock requirement. See, *e.g.*, Richard V. Campbell, *Wisconsin's Comparative Negligence Law*, 7 Wis. L. Rev. 222, 231 (1932) (under Wisconsin's "less than" regime, "[n]o change has been made [with respect to traditional causation requirements] by the new law. Only negligence of the respective parties which operates as a legal or proximate cause of the injuries in issue will be considered in determining the proportions of fault."); Turk, *supra*, at 333 (summarizing the Georgia rule, including the requirement of proximate cause).

Proximate cause also was the rule at admiralty. FELA "was intended to 'brin[g] our jurisprudence up to the liberal interpretations that ... now prevail in the admiralty courts of the United States.'" *Ayers*, 538 U.S. at 163 (quoting 42 Cong. Rec. 4536 (1908) (alteration and emphasis in original) (remarks of Sen. Dolliver)). Around the time of FELA's enactment, this Court repeatedly recognized proximate cause as the rule in admiralty, which provided for division of damages when both parties were found at fault. See, *e.g.*, *The Manitoba*, 122 U.S. 97, 105, 111 (1887); *The G.R. Booth*, 171 U.S. 450, 452-53 (1898) ("the question [is] ... whether it is the explosion, or a peril of the sea, that is to be considered as the proximate cause of the damage, according to the familiar maxim *causa proxima non remota spectatur*."); *id.* at 460-61; *The Francis Wright*, 105 U.S. 381, 387 (1881) ("If the unseaworthiness was not the proximate cause of the loss, it is not contended the vessel can be charged with the damages."); see also *Aktieselskabet Cuzco* v. *The Sucarseco*, 294 U.S. 394, 404 (1935); *Jahn* v. *The Folmina*, 212 U.S. 354, 362 (1909). Cf. *The Max Morris* v. *Curry*, 137 U.S. 1, 15 (1890) (extending the divided damages rule to personal injury cases). Thus, both traditional contributory negligence and emerging comparative negligence schemes applied an equivalent standard of proximate cause to defendant and plaintiff negligence alike.

Because proximate cause was so firmly established at common law, and was not expressly altered by Congress in FELA, this Court and others have applied that rule in FELA cases of multiple causation and contributory negligence just as in the primary analysis of the defendant's negligence. See, *e.g.*, *Carter* v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430, 435-36 (1949); *Tiller*, 318 U.S. at 67; *Norfolk & W. Ry.* v. *Earnest*, 229 U.S. 114, 120 (1913) (affirming a jury instruction that "'[c]ontributory negligence is the negligent act of a plaintiff which, concurring and cooperating with the negligent act of a defendant, is the proximate cause of the injury'"); Daunis McBride, *Richey's Federal Employers' Liability, Safety Appliance, and Hours of Service Acts* § 66, at 156 (2d ed. 1916) ("In order to diminish a recovery the contributory negligence of the employee must have been the proximate cause of his injury."); see also *Ridge* v. *Norfolk S. R.R.*, 83 S.E. 762, 770 (N.C. 1914) ("[w]here there are two causes co-operating to produce an injury, one of which is attributable to defendant's negligence, the latter becomes liable, if together they are the proximate cause of the injury, or if defendant's negligence is such proximate cause").[11]

---

[11] Some courts and commentators erroneously reasoned that the contributory negligence of the plaintiff, if sufficiently causally related to the harm suffered to serve as a bar to recovery, would displace the causal effect of the defendant's negligence, and truly become the sole proximate cause. *See, e.g.*, *Lea* v. *Southern Pub. Utils. Co.*, 97 S.E. 492, 493 (N.C. 1918) ("It is well settled that when the plaintiff and defendant are negligent, and the negligence of both concur and continue to the time of the injury, the negligence of the defendant is, in a legal sense, not the proximate cause of the injury, and plaintiff cannot recover."). However, more thoughtful courts and commentators recognized that concurring proximate causes were characteristic of actions for contributory negligence. *See, e.g.*, *Spokane & Inland Empire R.R.* v. *Campbell*, 241 U.S. 497, 510 (1916) (rejecting the need to identify a "sole efficient cause" and recognizing the existence of "concurring proximate causes" in the context of a contributory negligence analysis); Beach, *supra*, § 26, at 35; 1 Seymour D. Thompson, *Commentaries on the Law of Negligence In All Relations*, § 217, at 212 (2d ed. 1901).

B. Modern Contributory And Comparative Negligence Schemes Apply The Same Causation Standards To Defendant And Plaintiff Negligence.

Not only was the rule of equivalence well settled at the time of FELA's enactment, but respondent cannot claim that the common law has evolved to a different rule. *Ayers*, 538 U.S. at 145 ("The Court's duty is to develop a federal common law of negligence under FELA, informed by reference to the evolving common law." (internal quotation marks omitted)). The same rule of equivalence applies today in traditional contributory negligence systems, in modern comparative negligence schemes, in admiralty, and even in contribution law governing the apportionment of damages among tortfeasors.

The Second Restatement of Torts, which elaborates the law of contributory negligence, explains that "[t]he rules which determine the causal relation between the plaintiff's negligent conduct and the harm resulting to him are the same as those determining the causal relation between the defendant's negligent conduct and resulting harm to others." *Restatement (Second) of Torts* § 465(2) (1965).[12]

Similarly, the Third Restatement of Torts, which sets forth the modern law of comparative negligence, provides that "[p]laintiff's negligence is defined by the applicable standard for a defendant's negligence." *Restatement (Third) of Torts: Apportionment of Liability* § 3 (2000); *accord* 1 Dan B. Dobbs, *The Law of Torts*, § 199, at 497 (2001) ("The same rules of proximate cause that apply on the issue of negligence

---

[12] *Accord Restatement (Second) of Torts* § 465 cmt. b:

> The rules which determine whether the causal relation between the plaintiff's conduct and his harm is such as to make the law regard it as a legally contributing cause and, therefore, ... sufficient to make his failure to exercise reasonable care for his own protection contributory negligence barring him from recovery against a negligent defendant, are the same as those which determine whether the conduct of the actor as defendant is sufficient to make him responsible and, therefore, liable for a harm to another.

also apply on the issue of contributory negligence." (footnote omitted)).

Modern admiralty law continues to follow the traditional rule of equivalent standards of proximate causation, as both courts and commentators recognize. *E.g.*, *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 838 (1996) (reaffirming proximate cause); 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 5-3, at 188-93 (4th ed. 2004); see also *id.* § 5-4, at 194 ("According to the rule of comparative negligence, the degree of fault of the plaintiff which proximately caused his injury reduces the total damage award by that percentage.").

Just as the division of responsibility between plaintiff and defendant is governed by equivalent rules of proximate cause, this same standard obtains in the law of contribution when fault is apportioned among multiple defendants. See 3 Fowler V. Harper, Fleming James & Oscar S. Gray, *The Law of Torts* § 10.2, at 46 (2d ed. 1986) (contribution requires that each defendant "'is legally liable for a part or all of the same damages'"); *e.g.*, *Seaboard Shipping Corp.* v. *Inland Waterways Corp. (In re Seaboard Shipping Corp.)*, 449 F.2d 132, 138 (2d Cir. 1971); *Southern Ry.* v. *Foote Mineral Co.*, 384 F.2d 224, 226, 228 (6th Cir. 1967). This principle is vividly illustrated by the Third Restatement of Torts, which describes different contribution systems (or "tracks") that jurisdictions adopt for the apportionment of indivisible harms, but declares the same causation standard for each. See *Restatement (Third) of Torts: Apportionment of Liability* § A18, at 160 & cmt. b; *id.* § B18, at 168 & cmt. c; *id.* § C18, at 186 & cmt. c; *id.* § D18, at 220 & cmt. e; *id.* § E18, at 241 & cmt. f. Likewise, the Restatement requires the same causation standard for divisible harms. See *id.* § 26 cmts. k, m, rptrs.' note to cmt. m, at 337 ("Ultimately, however, no party can be held liable without a finding of legal culpability and legal cause."); see also Uniform Comparative Fault Act § 1(b) & cmt. (1977) (amended 1979) ("For the conduct stigmatized as fault to have any effect under the provisions of this Act it must have

had an adequate causal relation to the claimant's damage. This includes the rules of both cause in fact and proximate cause.").

It should come as no surprise that in all these systems of law the same causation standard—proximate cause—applies to both defendant negligence and plaintiff contributory negligence. Then, as now, causation was measured by a single metric for all parties, and operated as a "gatekeeping concept[]" for both negligence and contributory negligence—it "exclud[es] some negligence from consideration when it is not causal in fact and when it is too remote." 1 Dobbs, *supra*, § 202, at 509. As Bigelow explained around the time of FELA's enactment, "[w]rongful acts or omissions cannot be set off against each other, so as to make the one excuse the other, unless they stand respectively in the situation of true causes to the damage[s]." Melville Madison Bigelow, *The Law of Torts* § 14, at 392 (7th ed. 1901). Once the causation hurdle was cleared, causation was not measured as part of the comparative fault analysis. "It is a basic intention in all loss apportionment statutes, once the fact of concurrent faults is found, to exclude the artificial rules of legal 'causation' and attack the problem of loss directly in the mutual faults from which an injury proceeds." Francis S. Philbrick, *Loss Apportionment of Negligence Cases Part II*, 99 U. Pa. L. Rev. 766, 806 (1951) (emphasis omitted).[13] So in *Union Oil Co.* v. *The San Jacinto*, for instance, this Court held that the determination of causation is logically antecedent to questions of apportionment, 409 U.S. 140, 141 (1972), and because there was no proximate causation, there could be no apportionment of damages, *id.* at 146. To adopt wholly different threshold causation standards, as the Missouri Supreme Court has done, is

[13] *See* 1 Dobbs, *supra*, § 201, at 504 ("[C]ourts in negligence cases ordinarily compare fault, not causation. Causation usually remains an all or nothing issue. Once it is established, the causal fault of the plaintiff is compared with the causal fault of the defendant."); *see also id.* § 202, at 509 ("this does not mean that causation itself is somehow put on the scales and weighed").

to turn causation into a point of relative comparison in just the way the common law never has and does not now permit.

C. Divergent Causation Standards Are Inconsistent With The FELA System Of Comparative Negligence, Which Apportions Damages Based On Relative Fault (Not Relative Causation).

Employing divergent standards of causation would conflict with Congress's goal in enacting the comparative-negligence regime of section 3. The purpose of the statute is to ensure that both the employee and the railroad "bear the burden" of their own negligence. H.R. Rep. No. 60-1386, at 1. Thus, "'[t]he design of this statute seems to be to place the responsibility for negligence in all cases just where it belongs, and to make everybody who is responsible for negligence which produces injury or an accident responsible for that part of it and to the extent to which they contributed to it.'" *Illinois Cent. R.R.* v. *Skaggs*, 240 U.S. 66, 73 (1916) (approving a jury instruction); *id.* ("'the plaintiff would be responsible himself to the extent to which he was to blame'"); see also *Tiller*, 318 U.S. at 65 ("'comparative negligence ... permits the jury to weigh the fault of the injured employee and compare it with the negligence of the employer, and, in the light of the comparison, do justice to all concerned'").[14] But,

---

[14] *See also* H.R. Rep. No. 59-2335, at 4 (1906) ("Each party shall pay the penalty of his own negligent act."); *id* at 4-5 ("What can be more fair than that each party shall suffer the consequences of his own carelessness?"); 42 Cong. Rec. at 4434. The clear purpose of the FELA was to make both parties responsible for their own negligence. *Id.* (statement of Rep. Clayton) (FELA "makes each party responsible for his own negligence, and requires each to bear the burden thereof"); *id.* at 4427 (statement of Rep. Sterling) (FELA "provides that the responsibility of the negligence of the employer and of the employee shall rest upon each. It requires the jury to reduce the damages in proportion to the negligence committed by the injured employee."). Indeed, when Congress amended FELA in 1939 to abolish the defense of assumption of the risk, Ch. 685, § 4, 53 Stat. 1404, 1404 (1939) (amending 45 U.S.C. § 54), its purpose was to "[re]establish the principle of comparative negligence, which per-

whereas Congress intended the negligence of employers and employees to be weighed by the same metric, the Missouri rule would place a thumb on the scale that has no textual warrant. See *Ganotis* v. *New York Cent. R.R.*, 342 F.2d 767, 768-69 (6th Cir. 1965) ("We do not believe that the Act also intended to make a distinction between proximate cause when considered in connection with the carrier's negligence and proximate cause when considered in connection with the employee's contributory negligence. If it had so intended, express words to that effect could easily have been used.").

The language of the statute makes plain Congress's intent that relative fault, not relative causal contribution, should determine the apportionment of damages. Section 3 provides that "the damages shall be diminished by the jury *in proportion to the amount of negligence* attributable to such employee." 45 U.S.C. § 53 (emphasis added). Ninety years of this Court's precedents confirm that the diminution of a plaintiff's damages under FELA depends upon an apples-to-apples comparison of the plaintiff's and the defendant's negligence. Under section 3, the jury determines the extent to which each party is to blame, evaluating both parties' negligence on the same scale, and reduces the plaintiff's damages accordingly:

> "if it should be found that both parties were to blame, that both were negligent, both the defendant and the plaintiff, then the defendant company is to be responsible to the extent to which it was to blame, and the plaintiff would be responsible himself to the extent to which he was to blame."

Skaggs, 240 U.S. at 73; *accord Lindsay*, 233 U.S. at 49 ("the damages are to be diminished in the proportion which [the plaintiff's] negligence bears to the combined negligence of himself and the carrier, —in other words, the carrier is to be exonerated from a proportional part of the damages corre-

---

mits the jury to weigh the fault of the injured employee and compare it with the negligence of the employer, and, in the light of the comparison, do justice to all concerned." S. Rep. No. 76-661, at 4 (1939).

sponding to the amount of negligence attributable to the employee"); *Earnest*, 229 U.S. at 121-22.

Skaggs, and this Court's other precedents like it, in no way suggest that the causation standards for negligence and contributory negligence may differ. On the contrary, this Court has indicated that the trigger for an analysis of comparative fault is that both the plaintiff and the defendant are a legal cause of the damages:

> where the *causal negligence* is attributable partly to the carrier and partly to the injured employee, he shall not recover full damages, but only a diminished sum bearing the same relation to the full damages that the negligence attributable to the carrier bears to the negligence attributable to both; the purpose being to exclude from the recovery *a proportional part of the damages corresponding to the employee's contribution to the total negligence.*

Seaboard, 237 U.S. at 501 (emphases added). The appropriate point of comparison is the parties' relative "blame"—i.e., their fault. See also 42 Cong. Rec. at 4427 (statement of Rep. Sterling) (FELA "provides that the responsibility of the negligence of the employer and of the employee shall rest upon each").

Thus, under FELA, the jury must determine the total "causal negligence" of both railroad and employee; apportion that total between the railroad and employee according to relative fault; and award "a proportional part of the damages corresponding to the employee's contribution to the total negligence." *Seaboard*, 237 U.S. at 501; *Earnest*, 229 U.S. at 122; see also *Carter*, 338 U.S. at 435-36. The statutory scheme of apportionment of damages depends upon the same standard of causation applying to both railroad and employee negligence.

In this case, Norfolk Southern asked that the jury be instructed with the same causation standard for contributory

negligence that the court instructed as to defendant negligence. JA 9-10. The trial court expressly declined to do so, JA 9-10, and instead (as the MAI require) gave instructions that required the jury to apply a more stringent standard to the issue of whether Norfolk Sourthern's negligence caused injury than to whether Sorrell's negligence did so. The Missouri requirement, and the decision below upholding it, are contrary to the precedents of this Court, do violence to the language of the FELA, and destroy the symmetry the Act envisions by allowing the jury to apportion damages between defendants and employees on an apples-to-oranges basis. Accordingly, the judgment should be reversed and the case remanded for a new trial.

II. DIVERGENT CAUSATION STANDARDS CANNOT BE JUSTIFIED ON THE GROUNDS THAT SECTION 1 ABROGATED THE PROXIMATE CAUSE RULE FOR RAILROAD NEGLIGENCE.

Despite the clarity of the statutory scheme, the Missouri Supreme Court has promulgated divergent causation instructions for railroad and employee negligence. See MAI 24.01 (Pet. App. 35a-36a), 32.07(B) (Pet. App. 36a). Mandatory state jury instructions cannot deprive parties of their rights under federal law. *St. Louis Sw. Ry.* v. *Dickerson*, 470 U.S. 409, 411 (1985). The Comments to the MAI, however, purport to justify a divergence based on Congress's supposed abrogation of the rule of proximate cause as to railroad negligence alone in section 1 of the Act:

> In an F.E.L.A. case, common law negligence rules are controlling *except* that these rules have been modified by F.E.L.A. Because of the "in whole or in part" language of the statute (Title 45, U.S.C.A., Section 51), the traditional doctrine of proximate (direct) cause is not applicable. A railroad is liable if its negligence is only the *slightest* cause of the employee's injury. *Rogers v. Missouri Pac. Ry.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957).

MAI 24.01, comm. cmt., at 373 (6th ed. 2002) (noting that this rule departs from the "traditional negligence case," where "it is mandatory for the plaintiff to include the word 'direct' or 'directly' in his instruction because of the proximate (direct) cause requirements"); see MAI 32.07(B) (Pet. App. 36a) (requiring proof for FELA contributory negligence instruction that the "negligence of [the] plaintiff directly contributed to cause his injury"). The MAI and comments reflect earlier Missouri Supreme Court decisions so interpreting *Rogers*. See *Ricketts*, 484 S.W.2d at 221-22; *Beard* v. *Railway Express Agency, Inc.*, 323 S.W.2d 732, 741-42 (Mo. 1959); *supra* at 4; Opp. 5-6 (defending MAI on the basis of *Rogers*).

The MAI are premised on a wholesale misreading of federal law. This Court repeatedly has held, from the inception of the Act, that the federal standard for railroad negligence under FELA is proximate cause. Section 1's requirement that a railroad is liable in damages if the injury "result[ed] in whole or in part" from its negligence, 45 U.S.C. § 51, is an elaboration of the common-law rule of proximate cause, not an abrogation of it. At the time of FELA's enactment, numerous common-law courts employed that very formulation in clarifying that proximate causation could be found even if there were multiple causes of injury. Finally, *Rogers* v. *Missouri Pacific Railway* did not *sub silentio* overrule decades of this Court's precedents establishing a federal rule of proximate cause under FELA; it relied upon them. 352 U.S. at 506 n.11, 507 n.13. *Rogers* simply rejected a particular state common-law conception of "proximate cause" that limited railroad liability to circumstances where its negligence was the "sole, efficient, producing cause of injury," *id.* at 506.

A. This Court Has Long Held, In Keeping With FELA's Plain Language, That Plaintiffs Must Prove That Railroad Negligence Proximately Caused Their Injury.

1. Section 1 of the Act renders railroads liable in damages for an injury to an employee engaged in interstate commerce

"resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51. This Court has held that this language established the rule of proximate cause: The plaintiff must prove that "negligence was *the proximate cause in whole or in part*" of the employee's injury. *Tennant* v. *Peoria & Pekin Union Ry.*, 321 U.S. 29, 32 (1944) (emphasis added). Accordingly, under FELA,

> "to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

Brady v. *Southern Ry.*, 320 U.S. 476, 483 (1943) (quoting *Milwaukee & Saint Paul Ry.* v. *Kellogg*, 94 U.S. 469, 475 (1876)). As a leading contemporary scholar of the Act summarized the law: "In order for the railroad company to be liable, its negligence must have been the proximate cause of the injury," and "[p]roximate cause is still to be determined according to the general existing rule on that subject." McBride, *supra*, § 55, at 138, 139.

Likewise, in *Davis* v. *Wolfe*, 263 U.S. 239 (1923), this Court reviewed and reconciled its precedents applying proximate cause, and set forth the following elaboration on the rule of proximate cause:

> The rule clearly deducible from these four cases is that, on the one hand, an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury; and, on the other hand, he can recover if the failure to comply with the requirements of the Act is a proximate cause of the acci-

> dent, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection.

Id. at 243.[15] Indeed, this Court has treated the issue as simply obvious: "It requires no reasoning to demonstrate that the general rule is that, where negligence is charged, to justify a recovery it must be shown that the alleged negligence was the proximate cause of the damage." *St. Louis, Iron Mountain & S. Ry.* v. *McWhirter*, 229 U.S. 265, 280 (1913).

In at least 20 cases in total, this Court has stated that the causation rule under FELA, just as at common law, is proximate cause. See also *Lang* v. *New York Cent. R.R.*, 255 U.S. 455, 461 (1921) (reversing for lack of evidence of proximate cause); *St. Louis-S.F. Ry.* v. *Mills*, 271 U.S. 344, 347 (1926) (same); *Northwestern Pac. R.R.* v. *Bobo*, 290 U.S. 499, 503 (1934) (same); see also *Brown* v. *Western Ry. of Ala.*, 338 U.S. 294, 297-98 (1949); *Carter*, 338 U.S. at 435; *O'Donnell* v. *Elgin, Joliet & E. Ry.*, 338 U.S. 384, 390 (1949); *Urie*, 337 U.S. at 195; *Coray* v. *Southern Pac. Co.*, 335 U.S. 520, 523 (1949); *Tiller*, 318 U.S. at 67; *Brady* v. *Terminal R.R. Ass'n*, 303 U.S. 10, 15 (1938); *Swinson* v. *Chicago, St. Paul, Minneapolis & Omaha Ry.*, 294 U.S. 529, 531 (1935); *New York*

---

[15] *Davis* was brought under the SAA, which is governed by the same rule of causation as other FELA claims of negligence. *See Carter*, 338 U.S. at 434 (under the SAA, "the test of causal relation stated in the Employers' Liability Act is applicable"). A breach of the SAA is negligence per se, and so the plaintiff still must prove causation and damages. Relevant here, the SAA right of recovery against a railroad is limited to an "injury the proximate cause of which was a failure to comply with the requirement of the Act." *Brady* v. *Terminal R.R. Ass'n*, 303 U.S. 10, 15 (1938) (internal quotation marks omitted); *St. Louis & S.F. R.R.* v. *Conarty*, 238 U.S. 243, 249 (1915); *Lang*, 255 U.S. at 461; *Louisville & Nashville R.R.* v. *Layton*, 243 U.S. 617, 621 (1917) ("carriers are liable to employees in damages whenever the failure to obey these Safety Appliance Laws is the proximate cause of injury to them when engaged in the discharge of duty").

Cent. R.R. v. *Ambrose*, 280 U.S. 486, 489 (1930); *Minneapolis, St. Paul & Sault Ste. Marie Ry.* v. *Goneau*, 269 U.S. 406, 409-10 (1926); *Union Pac. R.R.* v. *Hadley*, 246 U.S. 330, 333 (1918); *Spokane & Inland Empire R.R.* v. *Campbell*, 241 U.S. 497, 504-05, 510 (1916); *Earnest*, 229 U.S. at 119.[16]

2. The MAI's premise that the "whole or in part" language of section 1 abrogated the rule of proximate cause is not only refuted by this Court's precedents, but also it is wrong simply as a matter of statutory construction. This language has nothing to do with remoteness or proximacy of causation. Rather, it addresses multiple causation. It means that the carrier is responsible in damages, regardless of whether the employee's injury "result[s] in whole" from the carrier's negligence, or instead "result[s] ... in part" from carrier negligence and in part from other causes:

> It may be taken for granted that the statute does not contemplate a recovery by an employee for the consequences of action exclusively his own; that is, where his injury does not result *in whole or in part* from the negligence of any of the officers, agents, or employees of the employing carrier or by reason of any defect or insufficiency, due to its negligence, in its property or equipment. But, on the other hand, it cannot be said that there can be no recovery simply because the injured employee participated in the act which caused the injury.

---

[16] Lower courts at the time FELA was enacted interpreted the statute in the same fashion. *E.g.*, *Manson* v. *Great N. Ry.*, 155 N.W. 32, 34 (N.D. 1915) ("the negligence of the railway company or its employés must have been the proximate cause of the injury"); *Nelson* v. *Northern Pac. Ry.*, 148 P. 388, 390-91 (Mont. 1915) (the "rule recognized by the courts everywhere [is] that, in order for plaintiff to recover for personal injuries suffered by reason of a breach of duty owed to him by defendant, it is indispensably necessary that he allege facts and circumstances disclosing such breach of duty, and also establish by his evidence that it was the proximate cause of his injury").

Skaggs, 240 U.S. at 69-70 (emphasis added) (citation omitted); see also *Mobile & Ohio R.R.* v. *Campbell*, 75 So. 554, 557 (Miss. 1917) (interpreting a Mississippi statute with the same language as FELA).

Richey's treatise on FELA, published shortly after FELA's enactment, confirms that "in whole or in part" addresses multiple causation:

> Where two cases coöperate to produce an injury, one of which is attributable to the defendant's negligence, the latter becomes liable, if together they are the proximate cause of the injury, or if the defendant's negligence is the proximate cause. This must be taken to be the meaning of the words of the act declaring liability for injuries "resulting in whole or in part from the negligence," etc.

McBride, *supra*, § 55, at 140 (footnote omitted).

Were this interpretation of the statute not clear enough from its plain text and this Court's precedent, it is confirmed by the fact that courts and commentators prior to FELA's enactment commonly invoked the language of "in whole or in part" to explain multiple causation in the common law, and did so with explicit reference to rules of proximate causation:

> Not the sole proximate cause.—The plaintiff's negligence, in order to constitute a defense to the action he brings, need not, of course, be the *sole proximate cause* of the injury, for this excludes the idea of negligence on the part of the defendant, as in any legal sense material. If his negligence is the sole cause of his injury, it is not contributory negligence at all. So the Supreme Court of Iowa declares the rule to be that if the plaintiff's want of ordinary care was *in whole or in part a proximate cause* of his injury, he cannot recover.

Beach, *supra*, § 26, at 35 (emphases added); 1 Seymour D. Thompson, *Commentaries on the Law of Negligence In All*

Relations § 217, at 212 (2d ed. 1901) (same); see also *Georgia R.R. & Banking Co.* v. *Neely*, 56 Ga. 540, 1876 WL 3277, at *3 (1876) ("For the same reason the recovery is *wholly* defeated when his negligence is shown to have been the sole cause of the injury, it will be defeated *in part* when his negligence is shown to have been *part* of the cause." (emphases added)). Indeed, in the decades prior to FELA's enactment, dozens if not hundreds of courts—including at least 25 state supreme courts—used "in whole or in part" to refer to multiple causation in negligence actions. The phrase was used to clarify that an injury could have more than one proximate cause, not to lower the causation standard.[17]

3. This Court has held that, given the express abrogation of certain common-law rules in FELA, Congress is presumed not to have departed from the common law, *except* where it

---

[17] *E.g.*, *Southern Ry.* v. *Howell*, 34 So. 6, 7, 10 (Ala. 1903); *Gila Valley Globe & N. Ry.* v. *Lyon*, 80 P. 337, 340 (Ariz. 1905), *aff'd*, 203 U.S. 465 (1906); *St. Louis Iron Mountain & S. Ry.* v. *Coolidge*, 83 S.W. 333, 334 (Ark. 1904); *Schneider* v. *Market Street Ry.*, 66 P. 734, 736 (Cal. 1901); *Denver & Rio Grand R.R.* v. *Peterson*, 69 P. 578, 579 (Colo. 1902); *Park* v. *O'Brien*, 23 Conn. 339, 1854 WL 818, at *5 (1854); *Jacksonville Street Ry.* v. *Chappell*, 21 Fla. 175, 1885 WL 1758, at *6 (1885); *New York Chi. & St. Louis R.R.* v. *Periguey*, 37 N.E. 976, 977 (Ind. 1894); *Rietveld* v. *Wabash R.R.*, 105 N.W. 515, 517 (Iowa 1906); *Louisville & Evansville Mail Co.* v. *Barnes' Adm'r*, 79 S.W. 261, 262 (Ky. 1904); *Guthrie* v. *Maine Cent. R.R.*, 18 A. 295, 296 (Me. 1889); *Paquin* v. *Wisconsin Cent. Ry.*, 108 N.W. 882, 883 (Minn. 1906); *Memphis & Charleston R.R.* v. *Jobe*, 10 So. 672, 672 (Miss. 1891); *Cornovski* v. *St. Louis Transit Co.*, 106 S.W. 51, 54 (Mo. 1907); *Nord* v. *Boston & Mont. Consol. Copper & Silver Mining Co.*, 75 P. 681, 684 (Mont. 1904); *Ricker* v. *Freeman*, 50 N.H. 420, 1870 WL 3123, at *6 (1870); *Pendroy* v. *Great N. Ry.*, 117 N.W. 531, 536 (N.D. 1908); *Baltimore & Ohio R.R.* v. *Kreager*, 56 N.E. 203, 205 (Ohio 1899); *Trickey* v. *Clark*, 93 P. 457, 460 (Or. 1908); *Rosevear* v. *Borough of Osceola Mills*, 32 A. 548, 560 (Pa. 1895); *Cooper* v. *Georgia, Carolina & N. Ry.*, 39 S.E. 543, 545-56 (S.C. 1901); *Mayor of Knoxville* v. *Cox*, 53 S.W. 734, 735 (Tenn. 1899); *Gulf, Colo. & Santa Fe Ry.* v. *Shieder*, 30 S.W. 902, 903 (Tex. 1895); *Barrickman* v. *Marion Oil Co.*, 32 S.E. 327, 333 (W. Va. 1898); *Bolin* v. *Chicago, St. Paul, Minneapolis & Omaha Ry.*, 84 N.W. 446, 448 (Wis. 1900).

did so explicitly. *Ayers*, 538 U.S. at 145; *Morgan*, 486 U.S. at 337-38 (holding that, because Congress abrogated some common-law rules explicitly but did not address "the equally well-established doctrine barring the recovery of prejudgment interest, ... we are unpersuaded that Congress intended to abrogate that doctrine *sub silentio*"); *Bailey* v. *Central Vt. Ry.*, 319 U.S. 350, 352 (1943); see also *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 86 (1994) ("*Inclusio unius, exclusio alterius.*"). Indeed, during the debates on FELA, legislators expressly averted to the presumption that Congress does not depart from the common law except when it does so expressly. See 40 Cong. Rec. 4601, 4603-04 (1906) (statement of Rep. Driscoll) ("[g]enerally a statute in derogation of the common law is strictly construed 'expressio unius est exclusio alterius,'" and so Congress should make explicit any changes it intends to the common law). This Court has specifically noted that proximate cause was not one of the doctrines that Congress abrogated. Congress in 1908 "abolished the fellow servant rule, substituted comparative negligence for the strict rule of contributory negligence, and allowed survivors' actions for tort liability," and in 1939 abrogated the defense of assumption of the risk, but there still remained the common law requirement that the plaintiff prove "whether the carrier was negligent and whether that negligence was the proximate cause of the injury." *Tiller*, 318 U.S. at 62-67.

Indeed, an implicit abrogation of proximate cause in the 1908 statute would be particularly unlikely given the accepted view that proximate cause was "too firmly founded on reason and justice to be lost sight of in any discussion of liability for negligence." Beach, *supra* § 305, at 446. Such a standard was deemed necessary, lest a defendant's liability run forever:

> The chief and sufficient reason for this rule is to be found in the impossibility of tracing consequences through successive steps to the remote cause, and the necessity of pausing in the investigation of the chain of events at the point beyond which experience and obser-

> vation convince us we cannot press our inquiries with safety.

T. Cooley, *A Treatise on the Law of Torts* 73 (2d ed. 1888), *quoted in Associated Gen. Contractors of Calif.*, 459 U.S. at 532 n.24; 1 J.G. Sutherland, *A Treatise on the Law of Damages* 57 (1883). Proximate cause identifies "not what philosophers or logicians will say is the cause" but "[t]he practical question for a jurist [as to] whether the tortious conduct of any human being has had such an operation in subjecting a plaintiff to damage as to make it just that the tortfeasor should be held liable to compensate the plaintiff." Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 Harv. L. Rev. 103, 104 (1911).

4. Strong confirmation of proximate cause's entrenched status in FELA came during consideration of the 1939 amendment to the Act. The House considered an amendment which would have abolished the defense of assumption of risk "where the negligence of such common carrier, its officers, agents, or employees, *proximately contributed* to the injury or death of such employees." 84 Cong. Rec. 10,709, 10,710 (1939) (emphasis added). In testimony before a House Committee, however, the General Counsel for the Brotherhood of Railroad Trainmen argued that this language was wholly unnecessary:

> [T]he word "proximately" is pure surplusage, because unless the negligence proximately caused the injury there can be no recovery.... Leaving it in I do not believe adds anything to it unless possibly some confusion, because it is not in any of the other sections. You might just as well use the word "proximately" in the first part of the act as to use it there; and, of course, it is not used in the first part of the act.

Hearing Before the H. Comm. on the Judiciary, 76th Cong., 5 (Apr. 17, 1939) (statement of Tom J. McGrath, General Counsel, Brotherhood of Railroad Trainmen) (House Unpub-

lished Hearings Collection). This amendment was ultimately rejected and the plain inference is that the term was unnecessary.

B. *Rogers* Did Not *Sub Silentio* Overrule Decades Of Precedent Establishing A Federal Rule Of Proximate Cause Under FELA.

The claim that *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957), silently overturned settled law and abolished the proximate cause requirement is groundless. Far from overruling this Court's numerous proximate-cause precedents, *Rogers* expressly relied upon them. *Infra* at 39.

Rogers, instead, was concerned with a different issue—it rejected a particular common-law conception of "proximate cause," which erroneously held that in cases of multiple causation, plaintiffs must show that the railroad's wrongful act was the "sole, efficient, producing cause of injury." 352 U.S. at 506. That much-criticized formulation had crept into many common-law decisions of the time.[18] The concept of "sole proximate cause" was contrary to the logic of the common

---

[18] *See* Prosser, *supra*, at 468 & n.16 (1953) ("Most of the decisions [adopting contributory negligence as a bar to recovery] have talked about 'proximate cause,' saying that the plaintiff's negligence is an intervening, insulating cause between the defendant's negligence and the injury. But this cannot be supported unless a meaning is assigned to proximate cause which is found nowhere else." (footnote omitted)); Fleming James, Jr., *Contributory Negligence*, 62 Yale L.J. 691, 693-94 & nn.14-16 (1953) ("Earlier legal thinking had been very much dominated ... by the notion that while there may be many causes of an injury in a lay or scientific sense, yet the law should quest for a sole or principal *proximate* cause."); *id.* at 696-97; Leon Green, *Contributory Negligence and Proximate Cause*, 6 N.C. L. Rev. 3, 11-12 (1927); *see also* John G. Phillips, *The Sole Proximate Cause "Defense": A Misfit in the World of Contribution and Comparative Negligence*, 22 S. Ill. U. L.J. 1, 15 (1997) ("In effect, sole proximate cause defeats the purpose of a comparative negligence system and simply replaces contributory negligence with a pseudonym."); *see also supra* n.11.

law and dominant conceptions of proximate cause,[19] and it was flatly contrary to the plain language of FELA and this Court's precedents. See 45 U.S.C. § 51 (liability if injury resulted "in whole or in part" from railroad negligence); McBride, *supra*, § 66, at 157 ("if the cause of action is established by showing that the injury resulted in whole or in part from the defendant railway company's negligence, the statute cannot be nullified and the right of recovery defeated by calling the plaintiff's act the proximate cause of the injury"). *Rogers* simply discarded that unduly stringent strand of proximate cause doctrine that was inconsistent with the statute. The Court reaffirmed that in circumstances where the jury could find either the employee's or the railroad's negligence to be the legal cause of the injury, the claim against the railroad had to go to a jury even if the railroad's contribution to the injury was relatively slight. 352 U.S. at 506.

Rogers was one of a series of cases in which this Court reversed lower courts that misused the term "proximate cause" in this fashion to deny plaintiffs a jury determination of their FELA claim against the railroad. Thus, in *Coray* v. *Southern Pacific Co.*, 335 U.S. 520, the lower court had held that a railroad's SAA violation (which caused a freight train to come to a sudden stop because of a brake malfunction) was not the proximate cause of the employee's death; it had reasoned that, because the employee could have avoided the accident if he had not been negligent in failing to brake the motor car that was following the train on the same tracks, the railroad's violation of the SAA was only a "'cause' in the 'philosophical sense'" of the fatal accident. In reversing, this Court held that "the introduction of dialectical subtleties can serve no useful interpretative purpose," given FELA's plain declaration "that

---

[19] *Restatement (Second) of Torts* § 430 cmt. d, at 428 ("In order that a negligent actor may be liable for harm resulting to another from his conduct, it is only necessary that it be a legal cause of the harm. It is not necessary that it be *the* cause, using the word "the" as meaning the sole and even the predominant cause.").

railroads shall be responsible for their employees' deaths 'resulting in whole or in part' from defective appliances such as were here maintained." *Id.* at 523-24. But, in reversing the lower court's *application* of the proximate-cause doctrine to the facts of that case, *Coray* explicitly stated that the proximate-cause standard of *Davis* remained the rule under FELA: "petitioner was entitled to recover if this defective equipment was the sole *or a contributory proximate cause* of the decedent employee's death. *Davis v. Wolfe*, 263 U.S. 239, 243; *Spokane & I.E.R. Co. v. Campbell*, 241 U.S. 497, 509-10." See *Coray*, 335 U.S. at 523 (emphasis added). And *Campbell*, upon which *Coray* relied, held (in language that *Rogers* later would mirror) that "the violation of the safety appliance act need not be the sole efficient cause, in order that an action may lie." 241 U.S. at 510; see also *Stringfellow*, 290 U.S. at 325-26 (interpreting a Florida comparative-fault statute; "sole proximate cause" need be proved only to defeat recovery entirely).

In *Rogers*, the state court had improperly taken the case from the jury despite evidence that the railroad's negligence was one of two possible legal causes of his injury. The plaintiff had been burning weeds on a sloping track bed. When a train passed, it fanned the fire he had created, and forced the employee back onto a culvert where he slipped on gravel and fell off the culvert, injuring himself. The employee adduced evidence that the railroad was negligent in requiring him to work near the tracks where passing trains could fan the flames around him, and in failing to maintain the surface of the culvert; the railroad countered that the plaintiff was negligent in not watching his fire. 352 U.S. at 502-04. The Court expressly stated that, on the evidence presented, the jury could have found either the employee or the railroad to have been the legal cause of the injury. *Id.* at 504.

But, even though the jury had found for the plaintiff, the Missouri Supreme Court reversed, in part on the ground that the employee's "conduct was at least as probable a cause for

his mishap as any negligence of the [railroad], and that in such case there was no case for the jury." *Id.* at 505. The Missouri decision amounted to an erroneous ruling that "there is no jury question in actions under this statute ... unless the judge can say that the jury may exclude the idea that his injury was due to causes with which the defendant was not connected." *Id.* at 505-06. Thus, this Court held, the state court had improperly invoked "language of proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the *sole, efficient, producing cause* of injury." *Id.* at 506 (emphasis added). A rule that the railroad's negligence must be the "sole" cause of injury is contrary to the statutory directive that renders railroads liable if they are a cause "in whole or in part" of the employee's injury, 45 U.S.C. § 51, and likewise is inconsistent with basic principles of causation, see *supra* note 18. "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." 352 U.S. at 506 & n.11 (citing *Coray*, 335 U.S. 520). If that test is met, "a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities." *Id.* at 507.

The *Rogers* rule is that when there is evidence sufficient to support a verdict against the railroad (*i.e.*, to support a finding that the railroad's negligence was one proximate cause of the injury), no matter how slight its causal contribution relative to other causes, as well as evidence to support a finding that the plaintiff's negligence also was a legal cause of the injury, *id.* at 504, the plaintiff's claim against the railroad must go to the jury, *id.* at 506. The existence of a jury question is not "dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury." *Id.* Nothing in *Rogers* questions the longstanding FELA rule for determining when a railroad's negligence is a legal cause

of the injury—namely, that the railroad's wrongful act must be "a proximate cause of the accident which results in his injury," and not "merely create[] an incidental condition or situation in which the accident, otherwise caused, results in such injury." *Davis*, 263 U.S. at 243; see also *Brady*, 320 U.S. at 483.

Rogers' discussion of employer negligence playing the "slightest" part in injury, 352 U.S. at 506, likewise reaffirms the traditional proximate-cause standard under FELA for cases involving multiple causation. At the time FELA was enacted, such language was not used in contradistinction to proximate cause, but rather to explain that the relative significance of a negligent act that proximately caused injury did not affect liability:

> The doctrine that contributory negligence in any degree, *however slight*, will bar a recovery, requires that this negligence should *contribute proximately* to produce the injury. In this view it was held error for a court to refuse to charge that, if the jury believe from the evidence that the plaintiff was guilty of negligence which, combined with the defendant's negligence, produced the accident so that both acts constituted *the proximate cause of the injury*, then the negligence of the plaintiff, *however slight*, would bar recovery.

7 Edward F. White, *A Supplement to the Commentaries on the Law of Negligence of Seymour D. Thompson, LL. D.* § 170, at 25 (1907) (footnotes omitted) (emphases added).

Courts of the era commonly employed this same formulation in FELA cases to hold that the railroad could be held liable if its negligence was a proximate cause, even if its causal contribution was slight relative to that of the employee's negligence. *E.g.*, *Hines* v. *Sweeney*, 201 P. 165, 170 (Wyo. 1921) ("Under this act the railroad company is liable, if its negligence contributes proximately to the injury, no matter how slightly, and no matter how great may be the negligence of

the employee."); *New York Chi. & St. Louis R.R.* v. *Niebel*, 214 F. 952, 955 (6th Cir. 1914) (a railroad "is liable, if through other employés it is guilty of any causative negligence no matter how slight in comparison to that of plaintiff"); *Atlantic Coast Line R.R.* v. *McIntosh*, 198 So. 92, 96 (Fla. 1940) (Brown, J., expressing the opinion of the court with regard to this issue and dissenting in part). *Rogers*' use of this terminology should be understood in the same way—as simply reaffirming the well-established rule of proximate cause, and reversing an unduly narrow requirement of sole cause.

This reading of *Rogers* is confirmed by the fact that, far from abrogating this Court's proximate-cause precedents under FELA, *Rogers* explicitly relied upon them. It derives its "test of a jury case" from *Coray*, see *Rogers*, 352 U.S. at 506 & n.11, and *Coray* (as noted above) reaffirmed, citing *Davis*, that the railroad's negligence must be either "the sole or a contributory proximate cause" of the employee's injury. *Coray*, 335 U.S. at 523. Moreover, *Rogers* observed that in cases involving violations of the SAA, the jury could not consider the plaintiff's contributory negligence, and "[t]he only issue then remaining is causation," 352 U.S. at 507 & n.13 (citing *Carter*, 338 U.S. 430). And *Carter* (which itself quotes *Coray*, 335 U.S. at 523) likewise held that the railroad can only be held liable if "the jury determines that the defendant's breach is 'a contributory proximate cause' of injury." *Carter*, 338 U.S. at 435.

It is significant that none of the dissenting justices in *Rogers* understood the majority decision as a sweeping abrogation of this Court's numerous earlier precedents establishing proximate cause under FELA. Justice Frankfurter would simply have dismissed the writ as improvidently granted because he regarded *Rogers* as yet another "insignificant" FELA case about the sufficiency of the evidence. *Ferguson*, 352 U.S. at 546 (Frankfurter, J., dissenting). (Justice Frankfurter filed a dissent in *Ferguson* that also applied to *Rogers* and

two other cases.) He noted that, although the Act abolished certain defenses to liability, it was the "historic cause of action for negligence as it has developed from the common law," *id.* at 538, with the proviso that "on the question of causality, the statute had tried to avoid issues about 'sole proximate cause,' meeting the requirement of a causal relation with the language that the injury must result 'in whole or in part' from the employer's negligence," *id.* at 538 n.7. That is, Justice Frankfurter gave *Rogers* precisely the interpretation set forth above, and did not understand the majority to have abolished proximate cause in contravention of existing precedent.

Furthermore, it would be passing strange for this Court in *Rogers* to overrule silently a long and consistent line of its precedents from the inception of the Act establishing proximate cause as the federal rule under FELA, and to adopt in its stead something as radical as "slight" cause as the basic standard for defendant's liability. "[C]onsiderations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977); *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974).

Nor did the petitioner in *Rogers* ever ask the Court to overrule *Davis* or any other precedent of this Court establishing proximate cause as the FELA standard. Indeed, he saw no conflict between proximate cause and the "in whole or in part" language of section 1. He affirmatively argued that "by reason [of the railroad defendant's negligence], plaintiff was caused to fall and to be injured thereby all of which *directly and proximately resulted, in whole or in part*, from the negligence of the defendant as aforesaid." Brief for Petitioner at 9, *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500 (1957) (No. 28) (emphasis added); *id.* at 4, 19, 24-26 (arguing that the railroad's "negligence was the *proximate cause* of petitioner's injury" (capitalization omitted; emphasis added)). The petitioner simply contended that by allowing recovery for injuries caused "in part" by the railroad's negligence, FELA had re-

jected "the old concept of proximate cause," wherein "th[e] cause must have been direct, the complete, the responsible, the efficient cause of the injury." *Id.* at 25. The railroad should be held liable, he argued, even if "some other factor may logically be said to be more influential in producing the injury." *Id.* at 27. The Court in *Rogers* did what petitioner suggested: it rejected unduly narrow formulations of proximate cause that inappropriately barred recovery in multiple causation cases, but did not question the federal rule of proximate cause as the standard for legal causation.[20]

Under these circumstances, this Court's longstanding interpretation of FELA must stand. A FELA claim cannot go to the jury if the railroad's wrongful act "is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury." *Davis*, 263 U.S. at 243. In establishing a "test for a jury case," *Rogers* simply adds that, if the evidence would permit a jury to choose among multiple possible proximate causes of the injury (such as the employee's and the railroad's negligence),

---

[20] In cases arising after *Rogers*, this Court has stated in dicta that FELA employs a "relaxed standard" of causation, *Gottshall*, 512 U.S. at 543, and that a FELA plaintiff "is not required to prove common-law proximate causation," *Crane* v. *Cedar Rapids & Iowa City Ry*, 395 U.S. 164, 166 (1969). Those statements are true insofar as they mean that *Rogers* rejected the older common law conception of "proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury." *Rogers*, 352 U.S. at 506. Indeed, the proximate cause holding of *Davis* was regarded as a "liberal" interpretation of the "resulting in whole or in part" language of FELA. *Brady*, 303 U.S. at 15. This Court has expressly recognized that *Davis* remains good law in a case decided after *Rogers*. *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 434 (1958). But if these statements are construed to mean that *Rogers* abrogated altogether even the federal rule of proximate cause, such dicta would not be controlling, and could not support the overruling of the many precedents of this Court affirming that rule. *Humphrey's Executor* v. *Myers*, 295 U.S. 602, 626 (1935).

the claim against the railroad must be allowed to go to the jury even if the railroad's negligence played the "slightest" part in the injury; such negligence need not be "the sole, efficient, producing cause of injury." 352 U.S. at 506.

C. Applying Equivalent Proximate-Cause Standards To Defendant Negligence And Plaintiff Contributory Negligence Is The Best Rule As A Matter Of Policy.

Recognizing a rule of proximate cause that applies to both plaintiff and defendant negligence is not only compelled by a century's worth of precedents, both under common law and FELA. It also makes good sense. The wisdom of this rule is confirmed by the fact that petitioner has been unable to identify any other tort law system that makes liability depend upon a finding of slightest cause, nor is petitioner aware of a single contributory- or comparative-negligence regime, whether past or present, that employs different causation standards for plaintiff and defendant negligence. Proximate causation remains the rule throughout tort law, and is widely adopted by Congress in statutes that provide damages remedies for injury to person and property. As elaborated below, there are a variety of reasons for such uniformity.

1. Proximate Cause Is Widely Recognized As A Fundamentally Just Standard.

Proximate cause is not an anachronism; it continues to be the rule at common law today. See *Restatement (Second) of Torts* §§ 281(c), 430-462; *Restatement (Third) of Torts: Apportionment of Liability* § 3. Notably, this Court repeatedly has interpreted statutes and common-law rights of action that do not specify a causation standard—including statutes that might reasonably be read as requiring mere but-for causation—as incorporating the traditional proximate-cause standard. See *Anza* v. *Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 1995-98 (2006); *Dura Pharms.* v. *Broudo*, 544 U.S. 336, 342-48 (2005); *Sofec*, 517 U.S. at 836-39 (1996); *Holmes* v. *Secu-*

rities Investor Prof. Corp., 503 U.S. 258, 268 (1992); *Associated Gen. Contractors of Cal.*, 459 U.S. at 527; *Southern Pac. Co.*, 245 U.S. at 533-34.

In *Associated General Contractors*, for instance, this Court addressed the causation standard under section 4 of the Clayton Act. That statute permits recovery for any injury to business or property "*by reason of* anything forbidden by in the antitrust laws." 15 U.S.C. § 15. Given this capacious language, "[a] literal reading of the statute is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation." 459 U.S. at 529. Nonetheless, just as with FELA, the statute's legislative history required an inquiry into its "common-law background," *id.* at 531; see also *id.* at 532, and this Court recognized that the common law long has required a showing of proximate cause. See *id.* at 532 & n.24 ("'Natural, proximate, and legal results are all that damages can be recovered for, even under a statute entitling one "to recover *any* damage."' 3 J. Lawson, *Rights, Remedies, and Practice* 1740 (1890)."); *accord id.* at 533-35 & n.30.

This Court's analysis has been the same in contexts as varied as admiralty, RICO, and the securities laws. In *Sofec*, the Court recognized proximate cause as the necessary standard in a common-law admiralty case. "[P]roximate causation principles are generally thought to be a necessary limitation on liability," and a contrary rule would lead to "extreme results"; after all, "'[i]n a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond.'" *Sofec*, 517 U.S. at 838.

This Court reached a similar conclusion in its recent cases defining the causation standard under the Racketeering-Influenced Corrupt Organizations (RICO) Act. RICO, like the Clayton Act, employs a broadly framed causation standard. As in cases arising under the antitrust laws, this Court found it highly "unlikel[y] that Congress meant to allow" re-

covery under RICO for mere "but-for" causation. *Holmes*, 503 U.S. at 266. It reasoned that "the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors." *Id.* at 269. Just this past Term, this Court in *Anza* reaffirmed the proximate-cause rule under RICO, recognizing that "without a showing of "some *direct relation* between the injury asserted and the injurious conduct alleged," courts have "difficulty" in "attempt[ing] to ascertain the damages caused by some remote action," and there can be no end to litigation. *Anza*, 126 S. Ct. at 1998 ("[t]he element of proximate causation ... is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation").

Dura presented a similar issue under the securities laws, where neither the common law nor the subsequently enacted statute specified the necessary causal connection; rather, a statutory provision merely provided that plaintiffs must prove "that the defendant's misrepresentations 'caused the loss for which the plaintiff seeks to recover.'" 544 U.S. at 345-46 (quoting 15 U.S.C. § 78u-4(b)(4)). As in each of the other cases cited above, this Court looked to "the common-law roots" of the cause of action, *id.* at 344, and in so doing held that the plaintiff "need[s] to prove proximate causation," *id.*

Substituting "slightest" cause as the standard for legal cause under FELA in place of proximate cause would cause a dramatic and unwarranted expansion of railroad liability, and would lead to absurd results. Tort law has always differentiated legal cause from cause-in-fact, see *Restatement (Second) of Torts* § 435, but a "slightest cause" standard—or, as some courts have termed it, a "'featherweight'" causation standard, *Johnson* v. *Offshore Express, Inc.*, 845 F.2d 1347, 1352 (5th Cir. 1988)—is not materially different from but-for causation. Applying such a standard "would be but a lottery, and purposeless." *Porter* v. *Bangor & Aroostook R.R.*, 75 F.3d 70, 72 (1st Cir. 1996). Absent a requirement that the railroad's

negligence be a proximate cause of the employee's injury, FELA becomes less a tort statute than a worker's compensation statute for any wrongful act, but without the limitations on recovery that typically are embodied in worker's compensation statutes. See *Carter*, 338 U.S. at 437-38 (Frankfurter, J.).[21] Congress did not intend FELA to be a worker's compensation regime, and it certainly did not intend what the Missouri rule would create—a worker's compensation regime with tort damages. See *Gottshall*, 512 U.S. at 543 ("That FELA is to be liberally construed, however, does not mean that it is a workers' compensation statute."); *Ellis* v. *Union Pac. Ry.*, 329 U.S. 649 (1947) ("The [FELA] does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur."); *Inman* v. *Baltimore & Ohio Ry.*, 361 U.S. 138, 140 (1959); see Br. of Association of American Railroads at 15-16 (contrasting tort and worker's compensation insurance schemes).

Indeed, the very purpose of proximate cause is to identify the point beyond which causation is so tangential that liability would be unjust. This is a legal and moral judgment about where liability should lie. See *Palsgraf* v. *Long Island R.R.*, 248 N.Y. 339, 351-52 (1928) (Andrews, J., dissenting) ("What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a

---

[21] FELA's causation standard also applies to the BIA and SAA, a fact that heightens the practical impact of the lower court's mistaken slightest-cause standard. Under those statutes, the railroad's duties are absolute and the contributory negligence of the employee cannot be considered to reduce damages. *See* 45 U.S.C. § 53; *Rogers*, 352 U.S. at 507 n.13. Congress intended absolute liability for injuries that are the "'natural and probable consequence[s]'" of the statutory violation, *Brady*, 320 U.S. at 483, but not for all injuries with only the slightest causal connection to a violation, including ones in which the violation "merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury," *Davis*, 263 U.S. at 243.

certain point."); *Blue Shield of Va.* v. *McCready*, 457 U.S. 465, 477 n.13 (1982) (quoting same). Because but-for causation (or "cause in fact") cannot and does not place appropriate limits on liability—after all, the consequences of an event stretch forward indefinitely into the future, and its causes equally far into the past—the doctrine of proximate cause (today as in the past) is necessary "to hold the defendant's liability within some reasonable bounds." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 44, at 302 (5th ed. 1984); see also *id.* § 43, at 300; *id.* § 41, at 264 ("As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability."); 1 Dobbs, *supra*, § 181, at 445-47.

In this regard, it would be fundamentally irrational to impose liability for less-than-proximate causes. By definition, this would mean assigning liability for causes where "the law is [not] justified in imposing liability." *Prosser & Keeton*, *supra*, § 41, at 264. Indeed, the rule respondent favors (Opp. 5-6) would extinguish the related doctrine of superseding cause, see *O'Donnell*, 338 U.S. at 394 n.7, such that the railroad would now presumably be responsible for Acts of God, such as lightning striking a worker who stood outside a train that was derailed by an engineer's negligence. Whatever uncertainty may attend the doctrine of proximate cause, the alternative is far worse. *Standard Oil Co. of N.J.* v. *United States*, 340 U.S. 54, 61 (1950) ("proximate cause ... cannot [be] predict[ed] with certainty," but "[l]ong experience with the proximate cause method in American and English courts have at least proven it adaptable and useful" in various contexts). When the inquiry into causation is untethered from more than a century's worth of common-law accretion regarding appropriate causal limits, the only possible result is that liability will be imposed for the most remote and the most unforeseeable of causes.

Predictably, that is precisely what has occurred in jurisdictions that have misinterpreted *Rogers* as imposing liability for less-than-proximate causes. In *Parker* v. *Atchison, Topeka & Santa Fe Railway*, 70 Cal. Rptr. 8 (Cal. Ct. App. 1968), the California Court of Appeal addressed a plaintiff's FELA claims that arose when he fell down twice—once on "terrain [that] was rutted and rough" (despite "visibility [that] was fair"), and the second time because there was "oil and grease on his shoe." *Id.* at 9. The court reversed a jury verdict for the defendant because the court had given a proximate-cause instruction, and concluded that even these meager allegations could support FELA liability: "Although the burden upon the plaintiff in proving causation in an F.E.L.A. case can be weighed neither in pounds nor ounces, it is a substantially lighter burden than that imposed upon him by [a standard proximate-cause instruction]." *Id.* at 10-11. Casting aside proximate causation in favor of a standard that "can be weighed neither in pounds nor ounces," *id.* at 10, leads inevitably to absurd cases like *Parker*, where liability can be imposed because an employee got oil on his shoe. See also, *e.g.*, *Peters* v. *CSX Transp., Inc.*, No. 04-cv-077, 2006 WL 42179, at *4 (W.D. Ky. Jan. 3, 2006) (denying summary judgment for a railroad when an *unrelated third party* ran into a barricade held by plaintiff); *Bailey* v. *Norfolk & W. Ry.*, 942 S.W.2d 404, 408 (Mo. Ct. App. 1997) (upholding jury verdict; the employee's work schedule and bad sleeping conditions in a railroad dormitory purportedly "disrupt[ed] ... [his] circadian clock," and thereby caused gastrointestinal disease and cardiovascular problems). Such a standard repudiates a century's worth of the common law and transforms FELA, by judicial amendment, into the worker's compensation statute—with tort damages—that Congress did not enact.

2. Divergent Causation Standards Are Inequitable And Hard To Administer.

Rogers thus did not create a diluted standard of causation for railroad negligence, while leaving the traditional proxi-

mate cause standard for employee negligence. Such an interpretation of *Rogers* cannot be reconciled with any rational conception of the statutory scheme, for divergent causation standards would be difficult to implement, and confusing for juries. To adopt the Missouri rule would require courts to instruct juries separately as to the different causation thresholds for plaintiffs and defendants, and thus not only to explain proximate cause, but also to differentiate that sometimes elusive concept from "slightest cause." See *Restatement (Third) of Torts: Apportionment of Liability* § 3 rptrs.' note to cmt. a, at 37 (different rules of causation would be "difficult to administer when different rules govern different parts of the same lawsuit").

These difficulties are all the greater in cases involving multiple parties. In a FELA case involving a claim for contribution against third parties, for instance, the railroad would be a defendant vis-à-vis the employee, but a plaintiff vis-à-vis the third parties. See *id.* (stating that different rules for plaintiffs and defendants should not be used because "[a] party could be both a plaintiff and a defendant"). Thus, under the Missouri rule, the jury would have to be instructed that the defendant's conduct vis-à-vis the plaintiff should be measured by a different standard than his conduct vis-à-vis third parties. This rule is senseless:

> [U]nless there are strong reasons to the contrary, the rules for proving plaintiff's negligence should be the same as the rules for proving defendant's negligence. The same party might be a plaintiff for part of a lawsuit and a defendant for another part of a lawsuit. It would be difficult to have the judge and jury perform different functions in evaluating that party's conduct as a plaintiff from those performed in evaluating that party's conduct as a defendant.

Id. § 4 rptrs' note to cmt. c, at 50-51.

What is more, even if the jury could follow such inevitably confusing instructions, requiring a defendant to prove a higher threshold of causation would lead to inequities. Imagine a case, for instance, in which a railroad defendant is 10% negligent, the plaintiff is 30% contributorily negligent, and two other tortfeasors whom the plaintiff does not sue (Δ_2 and Δ_3) are also 30% negligent. If the four parties were "slightest causes" (but not proximate causes, because there was a superseding cause of injury), under the Missouri rule the plaintiff could recover his full damages from the railroad (because FELA imposes joint and several liability, see *Ayers*, 538 U.S. at 159-66), but the railroad could not recoup any damages via contribution from Δ_2 or Δ_3, because contribution requires proximate cause, see *supra* at 20. Indeed, it is not uncommon for two different railroads to be the cause of a worker's injuries, such as where two trains collide, or one railroad operates over another's tracks. Congress would have had no reason to want a lesser causation standard to apply to one of the railroads simply because it was the employer of the injured worker. Applying the accepted standard of proximate cause to both the FELA plaintiff and defendant fulfills Congress's purpose in enacting FELA that all parties "bear the burden" of their own conduct in the apportionment of damages, H.R. Rep. No. 60-1386, at 1, and promotes just administration of contribution remedies as between the employing railroad and other tortfeasors.

Notably, the Missouri Supreme Court has not sought to explain why the use of different standards in this fashion has any grounding in policy. On the contrary, the MAI rely simply on the notion that *Rogers* abrogated the proximate-cause rule for plaintiffs, but left it in place for defendants. MAI 24.01 committee cmt. This is simply incorrect, as shown above.

Finally, if *Rogers* did abandon the settled rule of proximate cause established by this Court, it should be overruled. Alternatively, if this Court were to rule that "slightest cause" is the

standard that a jury should apply to railroad negligence, there is no basis for maintaining divergent standards, and that same standard must be applied to claims of employee contributory negligence as well. *Page* v. *St. Louis Sw. Ry.*, 349 F.2d 820, 823 (5th Cir. 1965). But there is no need for the Court to take this route. *Rogers* did not undermine this Court's prior construction of the causation provisions of section 1.

* * * *

The longstanding rule at common law is that both defendant negligence and plaintiff contributory negligence are measured by the same causal yardstick—proximate cause. Nothing in FELA abrogates this rule; on the contrary, at least 20 of this Court's decisions reaffirm and clarify the common-law rule. Proximate cause is the rule for both negligence and contributory negligence under FELA. Any other standard would contravene well-established principles of tort law, and would lead to unjust and perverse results that Congress did not intend.

CONCLUSION

The judgment should be reversed and the case remanded for a new trial.

Respectfully submitted,

LAURA D. HUNT
SENIOR GENERAL ATTORNEY
LAW DEPARTMENT
NORFOLK SOUTHERN
CORPORATION
3 Commercial Place
Norfolk, VA 23510

JAMES W. ERWIN
DAVID DICK
THOMPSON COBURN LLP
One US Bank Plaza
St. Louis, MO 63101

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
ERIC A. SHUMSKY
JULIE A. GURLEY
RUTHANNE M. DEUTSCH
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

July 17, 2006